

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO. 23-cr-80101-AMC

UNITED STATES OF AMERICA, Fort Pierce, Florida

Plaintiff, March 14, 2024

vs.

10:04 a.m. - 2:42 p.m.

DONALD J. TRUMP, WALTINE NAUTA, CARLOS
DE OLIVEIRA,

Defendants. Pages 1 to 173

TRANSCRIPT OF MOTIONS TO DISMISS
BEFORE THE HONORABLE AILEEN M. CANNON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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15 LAURA E. MELTON, RMR, CRR, FPR
16 Official Court Reporter to the
17 Honorable Aileen M. Cannon
United States District Court
18 Fort Pierce, Florida

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1 (Call to the Order of the Court.)

2 THE COURT: All right. Good morning. You may be
3 seated unless you are addressing the Court.

4 Please call the case.

5 COURTROOM DEPUTY: United States of America vs. Donald
6 J. Trump, Waltine Nauta, and Carlos De Oliveira.

7 Will the parties please make your appearance, starting
8 with Special Counsel.

9 MR. BRATT: Good morning, Your Honor. Jay Bratt and
10 David Harbach on behalf of the United States.

11 THE COURT: Good morning.

12 MR. BLANCHE: Good morning, Your Honor. Todd Blanche,
13 and I'm joined at counsel table with my -- the client,
14 President Trump, Emil Bove, and Chris Kise. Good morning.

15 THE COURT: Good morning.

16 MR. WOODWARD: Good morning, Your Honor. Stanley
17 Woodward and Sasha Dadan on behalf of Mr. Nauta, who is also
18 present.

19 THE COURT: Good morning.

20 MR. IRVING: Good morning, Your Honor. John Irving and
21 Donnie Murrell on behalf of Mr. De Oliveira. Thank you.

22 THE COURT: Good morning.

23 Good morning to all of you. And welcome back to
24 Fort Pierce. The same ground rules apply as I have indicated
25 in the past: No use or possession of electronic devices.

1 Please stay seated in the courtroom until the court recesses,
2 until there -- unless there is an emergency.

3 For counsel presenting argument, please do so from the
4 lectern. And if at any point anybody in the gallery or at
5 counsel table has trouble hearing, please also let me know.

6 As usual, we have set up our overflow room, which is
7 transmitting contemporaneously for the benefit of any
8 additional persons who wish to observe.

9 We have two motions on deck for today's hearing. The
10 first is docket entry 325. That is a motion to dismiss the
11 indictment based on unconstitutional vagueness, and it is filed
12 by Former President Trump. And the second motion is docket
13 entry 327, which is a motion to dismiss based on the
14 Presidential Records Act, filed by Former President Trump. And
15 that motion, I understand, is joined by Mr. De Oliveira.

16 Mr. Irving; is that correct?

17 MR. IRVING: Your Honor, insofar as...

18 THE COURT: I'm referring to docket entry 331, which I
19 believe is a notice of adoption. I just want to be clear if
20 you -- if -- if you have also signed on to 327.

21 MR. IRVING: Your Honor, I will have to look. I
22 apologize, but I don't believe that we signed on to either one
23 of these.

24 THE COURT: All right. Well, you should check that and
25 let me know soon.

1 All right. Mr. Woodward, on behalf of Mr. Nauta, have
2 you joined in either of the two motions?

3 MR. WOODWARD: Yes, Your Honor. We would -- we will
4 file a notice joining 327, but only insofar as should the Court
5 grant the relief that is sought by President Trump and conclude
6 that the official proceeding was, in fact, not an official
7 proceeding, then we would join in the relief sought in the
8 latter half of 327.

9 THE COURT: All right. Any notice of adoption must be
10 filed no later than tomorrow close of business.

11 MR. WOODWARD: We -- yes, Your Honor. We are waiting
12 to see the replies. Of course we don't want to join in a
13 motion that does not apply to our client. Now that this motion
14 has been fully briefed, we will put a notice in today.

15 THE COURT: Okay. All right.

16 So, Mr. Irving, in light of docket entry 331, which I
17 do believe generally purports to adopt the pretrial motions,
18 including 327, did you intend to present argument today on 327?

19 MR. IRVING: No, Your Honor.

20 THE COURT: No. Okay. All right then.

21 Well, I have reviewed both of the motions, the
22 respective oppositions filed by the office of the Special
23 Counsel, and the replies. Those replies were ordered on an
24 accelerated basis to accommodate this hearing. There was also
25 an amicus brief filed at docket entry 360-1, to which the

1 Special Counsel filed an opposition at docket entry 400, and I
2 reviewed those as well.

3 Some of the concepts in the motions overlap, so I will
4 understand if there is some crossover in the presentation, but
5 for purposes of organization and clarity, I would like to take
6 up the motions individually, starting with the vagueness
7 challenge at docket entry 327.

8 Because these are defense motions, I will hear from
9 defense counsel first as to both.

10 So with that, let me turn first to defense counsel with
11 respect to 327, which is -- excuse me -- the vagueness
12 challenge, which is 325 is the motion I would like to hear
13 first.

14 Who will be presenting argument on that motion?

15 MR. BOVE: I will, Judge. Thank you.

16 THE COURT: Okay.

17 MR. BOVE: Thank you, Judge.

18 So this is a motion to dismiss each of the 793 counts
19 on the basis of unconstitutional vagueness. And it is a motion
20 that challenges three aspects of Section 793; the Authorization
21 Clause, the NDI Clause, and the Entitlement Clause.

22 This case stands alone with respect to each of those
23 three issues as applied to President Trump. And when they're
24 considered collectively, these charges must be struck and
25 dismissed. There are four aspects of this case, and the way

1 the statute is being applied or attempted to being applied to
2 President Trump, that require that result.

3 First is President Trump's exercise of the original
4 classification authority with respect to the documents at
5 issue. Second, and this speaks to the overlap that Your Honor
6 mentioned, is that President Trump designated these records as
7 personal, pursuant to the Presidential Records Act. Third is
8 President Trump's access to executive privilege. And fourth is
9 the presidential immunity document.

10 THE COURT: Let me ask you this. Does your motion
11 depend on resolution of any facts that are not alleged in the
12 superseding indictment?

13 MR. BOVE: It -- I don't believe so, Your Honor,
14 because -- the four distinct --

15 THE COURT: Well, because one of the things you
16 mentioned right now was -- was the designation as personal.
17 That's, of course, an assertion that you have made in the
18 papers. That's not an alleged fact in the superseding
19 indictment.

20 And so my question is: Is this motion premature?
21 Because it would require the Court, essentially, to pass on a
22 motion in light of contested facts. So should we be having
23 this discussion really in the context, perhaps, of a motion for
24 judgment of acquittal or in some other posture, perhaps also
25 maybe in crafting jury instructions? But why are we having

1 this as-applied discussion now, given the potential for
2 disputed facts?

3 MR. BOVE: For two reasons, Judge. First of all, the
4 indictment alleges that President Trump caused these records to
5 be removed from the White House. That's paragraph 4 of the
6 superseding indictment. That allegation relates to a time
7 period when President Trump was the President of the
8 United States.

9 The inference from that allegation, from the language
10 that the Special Counsel chose, is that that removal of the
11 records constituted the designation as personal. That is an
12 inference that was granted in Judicial Watch, and it's
13 appropriate here. In addition --

14 THE COURT: Okay. So that's an inference that you wish
15 to draw based on paragraph 4 of the superseding indictment; is
16 that correct?

17 MR. BOVE: Yes. As well as concessions as to the
18 timing of the removal made in the Special Counsel's papers that
19 we've cited in our briefs.

20 THE COURT: Okay. But either way, the superseding
21 indictment at this point certainly doesn't take the position
22 that the documents are personal. And so I take your point that
23 that's what you're asserting, but I'm still left with a
24 contested factual point, and that leads me to the same
25 question, which is, isn't this motion premature?

1 MR. BOVE: I don't think so. And I want to stay on
2 this point first. What we're doing here is attributing legal
3 significance to a factual allegation. The legal significance
4 is the designation as personal under the PRA. The factual
5 allegation is causation while President Trump was in office
6 during his presidency. So I don't think that there is a
7 factual dispute. There is a legal argument about the
8 significance of when the Commander in Chief chooses to remove
9 his own records from the White House and transport them to the
10 residence.

11 We take those facts as true, that that happened, that
12 that transportation happened, and we attribute the same legal
13 significance to that fact that President Clinton got the
14 benefit of in Judicial Watch.

15 THE COURT: All right. Please continue.

16 MR. BOVE: There is a second point here, Judge, which
17 is that in as-applied challenges, I don't think the Court is
18 restricted to the allegations in the indictment. You're
19 allowed to consider, in this constitutional challenge to the
20 statute, the factual circumstances surrounding the case. And I
21 think -- obviously, and I think --

22 THE COURT: I'm not sure that's correct. If there are
23 disputes of fact, how am I to do that? Receive proffers which
24 aren't evidence from attorneys? That's the thing.
25 It's -- it's tricky in this posture to try to really adjudicate

1 contested facts.

2 MR. BOVE: It is tricky. I don't think they're
3 contested. I think the legal significance is contested. But I
4 think -- there is obviously a number of opinions considering
5 vagueness challenges that I think we're probably going to talk
6 about this morning, and in each of those opinions, the Court
7 resorts to facts that are outside the indictment.

8 THE COURT: Would that have been postconviction mostly?

9 MR. BOVE: No, Judge. The Schulte opinion that the
10 Special Counsel's office relies on speaks to experience as
11 a -- that that defendant's experience as a former CIA officer,
12 Hitselberger in the District of Columbia speaks to the training
13 that that person had in their job.

14 So I think that courts do, in as-applied constitutional
15 challenges, look to facts outside the indictment that bear on
16 the fair notice issue. But, again, our fundamental point, and
17 this is significant to both this motion and the PRA motion, is
18 that this causation allegation is the fact, and we are
19 attributing legal significance to that fact and that's
20 permissible.

21 THE COURT: All right. Let's get to the statutory text
22 of 793 as charged.

23 Am I correct that this is how it would read? And I've,
24 of course, stricken the text that's not applicable to the
25 charge.

1 It would just say like this: Whoever having
2 unauthorized possession of any document willfully retains the
3 same and fails to deliver it to the office or employee of the
4 United States entitled to receive it.

5 We have basic -- in other words, what is charged in
6 this count is a -- is a document-only retention count without
7 transmittal. And so we -- we skip over the intermediate
8 language of the statute; is that correct?

9 MR. BOVE: As a textual matter, yes. And I think the
10 Court -- when you described documents, you left off, for the
11 sake of brevity, the NDI Clause. But I understand that that
12 NDI Clause attaches to the type of document that's at issue in
13 these counts. So it's unauthorized possession; that's the
14 Authorization Clause. Document relating to the National
15 Defense; the NDI Clause. And, you know, retained and not
16 returned to a person entitled to receive it. When I say
17 "Entitlement Clause," that's the language I'm referring to.

18 THE COURT: Right. Okay. So whoever having
19 unauthorized possession of any document relating to the
20 National Defense willfully retains the same and fails to
21 deliver it to the officer or employee of the U.S. entitled to
22 receive it. That would be how Counts 1 through 32 are charged.

23 MR. BOVE: Yes, Judge.

24 THE COURT: Okay. In your understanding, who, as
25 charged, is the officer or employee of the United States

1 entitled to receive it in this case? In other words, who is
2 the individual that allegedly the defendant did not deliver the
3 documents to?

4 MR. BOVE: I don't think that's alleged specifically in
5 the indictment. And I think that that's one of the issues, not
6 the -- not necessarily the failure in the indictment to
7 identify a specific individual, but the concept more generally,
8 that, at minimum, it is ambiguous, provides no fair notice, and
9 allows for arbitrary enforcement in a situation where we have a
10 former president with his personal records at his residence,
11 who, in the United States Government, is entitled to retrieve
12 those records. And our position is that at -- in this motion,
13 is that that language, "entitled to," is unconstitutionally
14 ambiguous.

15 THE COURT: Why?

16 MR. BOVE: Because the concept of entitlement -- and I
17 think even the courts that have addressed this issue -- Rosen,
18 for one, addresses it -- acknowledges that there is no
19 definition of who would be entitled under any circumstance.
20 There is -- there is nothing in the statute
21 setting that -- setting forth that concept.

22 And so what Rosen did was look to Executive Order
23 13526. And there, the issue, Judge, is that that Executive
24 Order, to the extent it applies to records, does not apply to
25 the personal records of the President. And that is explicit in

1 the definition of records in Section 6(hh).

2 And so to the -- to the extent that the Rosen court
3 looked at this, it obviously was not -- the Court was not
4 considering the circumstances we have here. This is an
5 as-applied challenge, and in this setting where we're talking
6 about personally designated records under the PRA, no one is
7 entitled to receive those records from the President. NARA can
8 ask --

9 THE COURT: All right. Again, that calls for a factual
10 designation and classification of the records as personal,
11 which is outside the superseding indictment.

12 MR. BOVE: We respectfully disagree with that point
13 because the -- it's a legal concept applying the definitions of
14 personal and presidential under the PRA. We further, on this
15 issue, believe that the DOJ should be estopped from arguing
16 anything different than they did in Judicial Watch with respect
17 to President Clinton. We discussed that case at length in our
18 papers, but it bears mention here, Judge. Nobody in that
19 proceeding contemplated, could conceive of, even thought about
20 taking President Clinton's tapes back from him. And DOJ was
21 completely complicit and supportive of that outcome, as was
22 NARA, the agency administering the PRA, the agency who is
23 looking to these definitions that I'm talking about.

24 So how then --

25 THE COURT: One question. Is it uncontested that those

1 tapes contained classified information?

2 MR. BOVE: I believe so. And if it's not, it could not
3 be reasonably disputed based on the -- especially based on the
4 way the Special Counsel has spoken about classified information
5 and National Defense information in this case. Those tapes
6 contained disclosures that are written up in Taylor Branch's
7 book about discussions with foreign dignitaries, discussions
8 about military operations, things that parallel in a very
9 direct way the documents in this case.

10 So to the extent that it is contested -- and maybe
11 that's a question for the folks behind me -- it could not be
12 done in a reasonable way, based on the text of that book in the
13 way that it summarizes those tapes. They contain classified
14 information. And no one in that courtroom, at the argument of
15 Judicial Watch, was saying, well, there is an Executive Order
16 here governing classified information, so we've really got to
17 go back to President Clinton's home and retrieve those.

18 It was unspeakable. And it should have been here. And
19 that's one of the reasons that this phrase, "entitled to
20 receive it," has no content as applied to President Trump. And
21 to the extent that it has content, it's equally problematic in
22 the sense that it permits arbitrary enforcement. And there is
23 some overlap here with our selective prosecution motion on that
24 concept. But the 11th Circuit has said that the arbitrary
25 enforcement prong of the vagueness doctrine is the more

1 important consideration, the more salient concern.

2 And so when you have a situation here -- and we're just
3 talking about the -- one of the three clauses that collectively
4 make this statute unconstitutionally infirm with respect to
5 President Trump on this issue, pointing to an Executive Order
6 where there is no rulemaking authority, that's vague in its own
7 right, doesn't add any meaningful content to prevent arbitrary
8 enforcement. And, in fact, that's exactly what happened here.

9 THE COURT: So your concern is that the "entitled to
10 receive" clause doesn't explicitly incorporate or reference the
11 Executive Order or authorize regulations on the subject of
12 classification?

13 MR. BOVE: That's one of the concerns, is that there
14 is -- and I think there is some confusion in the papers from
15 the Special Counsel's office about what our argument is here.
16 There is no delegation from Congress in 793(e) to promulgate
17 regulations or Executive Orders to add content to phrases that
18 Congress declined to define.

19 THE COURT: And so the courts that have faced
20 challenges on the "entitled to receive" have -- have relied on
21 the Executive Order to provide that judicial gloss; is that
22 correct?

23 MR. BOVE: Yes. And I think, Judge, that that is
24 principally Rosen, and then circular cites to Rosen. I think,
25 respectfully, that Rosen is incorrect on this point, and that

1 this point that we are pressing, which is a nondelegation
2 argument, was certainly not discussed and, I don't believe,
3 made in Rosen.

4 And there -- we have cited other statutes. Congress
5 knows how to be explicit when they want to look to the
6 Executive Branch to -- to add content to their word choices.
7 But that's not what happened here. And I think that is why
8 it's important and significant that the Special Counsel's
9 office didn't bother to address any of the legislative history
10 that we laid out in our motions. Because in 1911, 1917, and in
11 1950, Congress thought about these issues, they had an
12 opportunity to define them with the necessary clarity, and they
13 did not do so.

14 And there is two points I want to make about
15 Congressional failures in this regard. The first is that in
16 1917, President Wilson and his administration proposed, as part
17 of the Senate bill that was under consideration, a delegation
18 of rulemaking authority. It's discussed in the Law Review
19 article that we cited; it's Section 6 of that bill. And
20 Congress declined to put it into the law. They explicitly
21 declined to provide that authority. And they said, we will do
22 our work as elected officials here. And it was insufficient.

23 And then in 1950, the Espionage Act that gives rise to
24 the 793 that we're talking about, that -- that Congressional
25 body has the benefit of the Supreme Court's analysis in *Gorin*,

1 and of the Heine case by Judge Hand in the 2nd Circuit. They
2 are on notice of these issues. And, again, there is no
3 rulemaking delegation. They left the language as is.

4 And under the residual clause cases that we have
5 cited -- Davis most recently -- when Congress chooses to do
6 something like that, in an Article III court with a criminal
7 defendant facing the kind of consequences that President Trump
8 faces here, the Court's obligation is not to rewrite the
9 statute, not to follow nonbinding judicial gloss from other
10 circuits. The Court's obligation is to strike the statute and
11 say, Congress, get it right.

12 And Congress is trying to get it right in part.

13 THE COURT: So the 11th Circuit hasn't really addressed
14 the arguments you've made thus far, except for, perhaps, on the
15 NDI Clause; is that correct?

16 MR. BOVE: With heavy emphasis on "perhaps," Judge,
17 because the Campa case is not a vagueness challenge; it's a
18 sufficiency of the evidence challenge. And in that setting,
19 Campa refers -- the 11th Circuit in Campa refers to Gorin. But
20 that's not affirming a vagueness challenge to this statute.

21 THE COURT: All right. Well, let's say you get to the
22 Executive Order and the Subsection (dd), would that language
23 not narrow the scope of the statute as opposed to broaden it?

24 MR. BOVE: Subsection (dd)? I'm sorry, Judge.

25 THE COURT: Which defines the need to know, I think it

1 is, of the Executive Order.

2 MR. BOVE: No, Judge, not at all. And I think that
3 that is really -- that's the -- one of the nubs to our argument
4 that is different and has not been analyzed, I don't think, by
5 any court, which is the complete lack of standards governing
6 what is need to know. And I am confident that that is apparent
7 to Your Honor, based on the way that that phrase has been
8 bandied about in the CIPA litigation.

9 If we say they need to know, they need to know; if we
10 say they don't need to know, they don't need to know. No court
11 has interpreted that. The definition is -- there are some
12 words there, but they are of limited content. And what's
13 really happening is the Executive Order is saying the Executive
14 Branch can make a decision about what that means in every case.
15 And that is extremely problematic under the Supreme Court's
16 holding in City of Chicago vs. Morales. Morales considered a
17 situation where, quote, "The police have adopted internal rules
18 limiting their enforcement to certain designated areas in the
19 city."

20 And the Court said those internal rules by the police
21 were not adequate to address the vagueness issue that the
22 statute presented. And I think it's a very similar issue here.
23 There is no delegation to the President to make this Executive
24 Order.

25 The National Security Act cited by the Special

1 Counsel's office at 3161(a) expressly does not include the
2 authority to promulgate regulations and Executive Orders
3 relating to presidents. And even if you get to the Executive
4 Order, it excludes personal records under the PRA.

5 And finally, where we are here, if you ignored all of
6 that -- and each of those is dispositive. If you ignored all
7 of them and just got right to the "need to know" point, it adds
8 no content to the phrase "entitled to receive it" or
9 "unauthorized access."

10 So this -- this "need to know" concept, to the extent
11 it's being invoked here as something that adds clarity or
12 governs a statute that never asked to be governed, the "need to
13 know" phrase is problematic for both the Authorization Clause
14 and the Entitlement Clause.

15 THE COURT: So let's shift to the Authorization Clause
16 for a moment, and just looking at the superseding indictment.
17 The date of the offense begins January 20th of 2021. So I
18 guess my question is: Hypothetically, on January 21 of 2021,
19 is the alleged crime of unlawful retention complete, according
20 to the theory as charged in the indictment?

21 So one day later, at that point, you would have all
22 three elements, allegedly. You would have the willful removal;
23 that decision allegedly would be purposeful. The documents
24 have the markings, so allegedly they would relate to the
25 National Defense. And there would be no authorization because

1 the presidency ended.

2 Is that how you read it? Because if the crime is
3 complete, let's say, one day later, then my question is: Any
4 other former official who would have in his or her possession
5 classified materials that they willfully removed, at that
6 point, they would be running afoul of this criminal
7 prohibition; is that correct?

8 MR. BOVE: So in Your Honor's description, there
9 was -- there was some -- some facts about classification
10 markings, another thing that I think -- the way I understood it
11 was that they were offered to support some legal allegations --

12 THE COURT: Let's assume the documents have
13 classification markings, and let's assume the documents relate
14 to the National Defense. Then anybody, a former official who
15 had authority prior to the expiration of the position, would
16 then -- would then lose that authority and, therefore, one day
17 later the crime of unlawful retention is arguably complete;
18 correct? One day later, day one of the crime -- or day two of
19 the crime.

20 MR. BOVE: So if you assume as -- in that -- I just
21 want to emphasize one part of the hypothetical -- that the
22 possession and retention was unauthorized -- because we dispute
23 that legally.

24 THE COURT: Well, I think the theory that is in the
25 indictment is that --

1 MR. BOVE: Right.

2 THE COURT: -- it was authorized prior to the
3 changeover. It became unauthorized the moment the presidency
4 ended. The documents were willfully taken, hence, crime
5 complete.

6 MR. BOVE: I -- I agree that that appears to be the
7 theory of the indictment. I do not -- that's not our theory,
8 but I agree that's the --

9 THE COURT: Okay. So if that's the theory of the
10 indictment, then -- then there would be other officials who
11 clearly would have run afoul of this prohibition as charged.

12 MR. BOVE: Unquestionably. And we don't -- and in some
13 respects, we don't want to make this a day about selective
14 prosecution, because we think that's an independent basis. But
15 the point that Your Honor just made, backed by history, backed
16 by Judicial Watch, The Clinton Tapes, backed by The Reagan
17 Diaries, and it has to be said, backed by the Hur report,
18 completely supports that theory.

19 And that is why the statute permits arbitrary
20 enforcement as written because they -- the government gets to
21 make decisions based on subjective criteria, here political
22 bias, that permit them to go out and bring charges like this.

23 THE COURT: Well, I guess my question is -- is in terms
24 of when does it become unauthorized? I think, according to the
25 theory of the indictment, it becomes unauthorized the moment

1 the presidency ends. And it really has nothing to do with any
2 demand for the documents that would have been triggered
3 following the issuance of the grand jury subpoena, given the
4 timing of the date of the offense in the superseding
5 indictment.

6 MR. BOVE: Again, I do -- I think that that's the
7 Special Counsel's theory of the case. I think that that is
8 wrong because President Trump designated the records as
9 personal when he took them out of the White House. And so in
10 terms of the authorization that we're talking about, our
11 position is that the reason -- this is more the PRA argument.
12 The reason that the 793 counts should be dismissed, based on
13 the clash between the PRA and 793, is that the government, as a
14 matter of law, cannot establish lack of authorization because
15 President Trump, like President Clinton, like President Reagan,
16 like President Biden as vice president, removed records from
17 the White House that were -- that constituted a personal
18 designation, and that was a completely viable and credited
19 legal theory in a completely credited manner doing business
20 with NARA.

21 To such an extent that in early 2023, as publicity
22 around this case and the situation with President Biden and
23 Vice President Pence started to get more scrutiny, NARA reached
24 out to past presidents and vice presidents. And then this is
25 written up in the New York Times article that we cited in our

1 reply.

2 And they said, hey, could you please take another look
3 to see if you have anything that might constitute a
4 presidential record?

5 And President Bush's team's response is quoted in the
6 article, and the response is basically, yeah, we're done here,
7 you have nothing to say to us.

8 THE COURT: So, okay, what is your definition of
9 "unauthorized"?

10 MR. BOVE: Judge, I don't have one, and that's why the
11 statute is unconstitutionally vague as applied to President
12 Trump.

13 THE COURT: So we would just -- it's not defined in the
14 statute, so we can resort to ordinary meaning, which then
15 permits use of dictionaries. So why wouldn't it just be the
16 standard meaning that the Special Counsel has offered, which is
17 without permission?

18 MR. BOVE: Well, respectfully, I don't think that's the
19 definition they offered. The definition they offered was
20 without official permission. And that word "official" is
21 critical to allow them to then argue that to -- invoke the
22 National Security Act.

23 But even the dictionaries they cite don't include the
24 requirement that the permission be official. And the
25 9th Circuit case that they cite, Nosal, speaks to private

1 authorization, which is a basic concept of property rights.

2 So what the government is trying to do here, to add
3 content that does not exist to that phrase, is to impute some
4 official requirement in order to allow the Court or themselves
5 to go look at another statute, not 793, as a hook back to the
6 Executive Order.

7 THE COURT: But the way -- the way it would be built
8 would be without official permission, and then the official
9 permission comes from the Executive Order if there is a waiver
10 provided by the sitting president?

11 MR. BOVE: Well, that's -- I mean, it would -- and,
12 again, we're just talking about my understanding of the
13 government's theory of -- of this piece. My understanding is
14 that, from their opposition brief, they cobbled together some
15 dictionary definitions that spoke --

16 THE COURT: Well, that's not inappropriate. I mean,
17 it's -- dictionary definitions can be used.

18 MR. BOVE: I agree with that. And I think that's
19 important because the dictionary definitions that they used did
20 not include the word "official" in terms of the permissions.
21 They -- the dictionary definitions, quite appropriately, and
22 consistent with the plain meaning of the term, include private
23 permissions.

24 And that is -- because that is the case, there is no
25 reasonable basis to then have the Court look from the

1 dictionary definition to the National Security Act to the
2 Executive Order. They need that word in their made-up
3 definition to allow those steps.

4 Without that word, where private permissions are part
5 of what is authorized or not, we're back to a contentless
6 phrase in a statute, words chosen by Congress, that Article III
7 courts are not in a position to remedy or correct.

8 THE COURT: All right. Well, in terms of precedent on
9 the authorized portion, you would agree that no court has
10 deemed that phrase unconstitutionally vague; correct?

11 MR. BOVE: Yes. That's correct; no court has deemed it
12 unconstitutionally vague. Multiple courts have deemed it
13 problematic, and multiple courts have then looked to the
14 mens rea element of the statute, and I would like to talk about
15 that, if I could.

16 THE COURT: Yes, please.

17 MR. BOVE: The -- the string of authorities that are
18 793 specific -- well, that are relied on for 793 vagueness
19 challenges start with the Supreme Court's ruling in Gorin. And
20 then there are four -- four circuit rulings. Dedeyan, Hung,
21 Morison, and Ford.

22 And if you trace the reasoning in those decisions, what
23 emerges is that what was significant to the Supreme Court in
24 Gorin, and significant to the earlier 4th Circuit cases, was
25 not just a willfulness requirement. They considered the

1 additional requirement, at issue in those cases or not, and in
2 Morison that is a debate, but the additional requirement that
3 the government established injury to the United States,
4 or -- or potential benefit to a foreign adversary.

5 THE COURT: That is not required here in terms of the
6 elements?

7 MR. BOVE: Well, yes, the -- the reason I'm pausing,
8 Judge, is because there is contrary case law, Morison, the
9 Kiriakou case that we cite, which I think is EDVA. There --
10 some courts have read the statute in a way that requires that
11 additional -- I'm going to refer to it as the injury
12 element -- that require that additional injury piece, plus
13 willfulness.

14 THE COURT: But for a 793(e) documents-only charge
15 without transmittal, it appears the statutory text would not
16 require that, in contrast to the text addressed by the Supreme
17 Court in Gorin.

18 MR. BOVE: I agree.

19 THE COURT: Okay.

20 MR. BOVE: And so my -- but my point is, Gorin should
21 not have been persuasive to any court considering this type of
22 vagueness challenge and the willfulness element because Gorin
23 had both pieces, willfulness plus injury. The 4th Circuit in
24 Dedeyan, both pieces, willfulness plus injury. Hung, two.
25 Same. Morison, both. Same.

1 And so then you have a series of string cites, maybe
2 the most recent is Schulte, relying on those cases. But
3 without meaningful discussion, I mean -- like, none of the fact
4 that Gorin was looking at a different statute. And when you're
5 talking about can a mens rea element sufficiently clarify and
6 narrow something, the fact that those earlier decisions are
7 looking at both parts is extremely significant.

8 THE COURT: I have a question on the willfulness. So,
9 of course, we have our pattern instructions in the
10 11th Circuit, and there are two that define the word
11 "willfully."

12 There is one that says: "The word willfully means that
13 the act was done voluntarily and purposefully" -- excuse me --
14 "purposely with the specific intent to violate a known legal
15 duty, that is, with the intent to do something the law forbids.
16 That is Pattern B9."

17 So in terms of the "doing something the law forbids,"
18 what is your understanding of what law is being breached there?

19 MR. BOVE: I think that's exactly the problem, Judge,
20 and that is why a willfulness on that B9 instruction does not
21 resolve the vagueness challenge is because, at most, that
22 instruction refers the jury back to the ambiguous terms and
23 says do your best. And that can't be enough on the facts that
24 we've described here, and it can't be enough when compared to
25 authorities that require both willfulness plus the injury

1 element.

2 I don't think it's sufficient when there are -- even
3 the courts that have rejected the vagueness challenges have
4 said -- these are -- these are serious issues, this is
5 problematic. The -- meaning the language chosen --

6 THE COURT: So has -- has there been a judicial gloss,
7 perhaps, in those contexts where a bad-faith component has been
8 injected to add a little more strictness to the willfulness,
9 otherwise, it's the simple willfulness?

10 MR. BOVE: It's possible. I can't -- I'm not going to
11 pretend that I have surveyed every set of jury instructions in
12 a 793(e) trial. But even -- even a general bad-faith
13 instruction would not address the vagueness problems. And I
14 think it's important here to -- to keep in mind the two prongs
15 of the vagueness doctrine. There is the fair notice piece --
16 and when we're talking about mens rea, that is really
17 what -- what we're focused on.

18 THE COURT: On the fair notice, just explain to me
19 something. In the case of a former president, is -- there
20 is -- the clearance status is inherent in the position itself;
21 is that correct?

22 MR. BOVE: As I understand it, yes. I think -- as
23 president --

24 THE COURT: After the presidency ends, is there any
25 sort of transaction or mechanism by which the clearance is

1 removed, suspended, or terminated?

2 MR. BOVE: I think -- I think that that has -- the
3 record reflects that that -- to the extent there is a process,
4 it is inconsistent and not -- not applied in a formal way, and
5 I'm referring to the Q clearance issue.

6 THE COURT: So in this case, setting aside Count 19,
7 was there a suspension of a clearance in a formal sense?

8 MR. BOVE: I think that it's -- it's -- there is a
9 statute that governs a president's clearance, and it's possible
10 that there is an argument from the government that, by
11 operation of law, that that no longer -- that the formal
12 clearance authorized by that statute doesn't --

13 THE COURT: What statute is that, do you know?

14 MR. BOVE: I don't have it at the ready, but I'm sure
15 Mr. Bratt will.

16 THE COURT: Okay.

17 MR. BOVE: But, Judge, I want to point out that the
18 superseding indictment, once -- one of the passages that the
19 government relies on as part of its argument that President
20 Trump had actual notice, is President Trump's statement
21 regarding the revocation of John Brennan's security clearance.

22 And in that statement, he -- President Trump -- and
23 this is in the indictment. So we're talking about what we're
24 stuck with on the four corners of the document -- refers to
25 "the practice of former officials maintaining access to our

1 nation's most sensitive secrets long after their time in
2 government has ended." That's their -- they chose to put that
3 in the indictment. They think that it has significance. I do,
4 too, probably for different reasons.

5 Here, what that reflects is that the authorization
6 concept, as understood, doesn't provide fair notice to
7 President Trump. And as applied here, reflects the type of
8 arbitrary enforcement that the Davis court was concerned about.

9 THE COURT: All right. I have another factual
10 question. In terms of the criminal referral referenced in the
11 indictment, was that criminal referral transmitted to the
12 former president? In other words, was he aware of the criminal
13 referral when it was made?

14 MR. BOVE: I would need -- I would need a moment to
15 answer that.

16 THE COURT: Okay. Okay. I think this is uncontested,
17 but I will ask the Special Counsel. Has NARA ever issued a
18 criminal referral outside of the context of -- of these
19 documents?

20 MR. BOVE: To my understanding, based on NARA OIG's
21 website, there may have been criminal referrals in other
22 settings, but I think that this is the first of its kind in
23 terms of -- you know, there is really three referrals in that
24 document that -- those referrals relating to -- I will just
25 speak to the ones that apply to my client -- efforts to recover

1 records from a former president are one of a kind.

2 And the reason that that's important -- and Mr. Blanche
3 will speak to that when we get to the PRA, but I want to
4 preview it -- is that in order to make the referral, NARA OIG
5 is acting pursuant to the OIG Act, which requires a reasonable
6 basis to believe that there is a criminal violation.

7 And in light of NARA's history and customs and
8 practice, reflected in Judicial Watch with President Clinton,
9 The Reagan Diaries, President Biden, all of the examples we
10 have cited, they had no reasonable basis to believe that there
11 was -- that there needed to be a referral or could be.

12 So our position is that that referral was unlawful
13 agency action because it violated the language of the statute.

14 THE COURT: Okay. Well, okay. Anything further on the
15 three clauses that you have taken issue with in 793(e)?

16 MR. BOVE: There is two points that I would like to
17 make, Judge.

18 One relates to the relevance of the executive privilege
19 and what it means to -- to or not to -- to be or not to be
20 unauthorized in this setting. These documents allegedly relate
21 to briefings that were provided to the President. They relate
22 to the types of sensitive, confidential communications over
23 which typically there would be a -- it's qualified, we
24 understand -- but a basis to invoke the executive privilege.

25 Courts in the D.C. Circuit, when they've looked at that

1 privilege, have spoken to, in the first instance, an obligation
2 for the Executive Branch and Congress to put their heads
3 together in the political sphere to resolve disputes over the
4 executive privilege.

5 One example of that is United States vs. AT&T, which is
6 a D.C. Circuit case from 1977, 567 F.2d 121. And in that case,
7 the D.C. Circuit rejected the idea that the Constitution
8 confers on the executive absolute discretion in the area of
9 national security. And so the significance of that is: AT&T
10 limits, and AT&T speaks to why the government's Egan case can't
11 support what they're trying to do here. Egan is about
12 appellate review of security clearances. AT&T goes through, in
13 a persuasive way, the limits on the executive's discretion in a
14 way that the Congress also has national security authority.

15 The examples in AT&T include: The power to declare
16 war. The power to fund the Army. The power to consent to
17 treaties. The power to appoint ambassadors.

18 So Congress has the authority under the Constitution to
19 speak in the area of national security. They spoke in the
20 Espionage Act of 1950. We are stuck with the words that they
21 chose. So it's no answer, I submit, to rely on Egan and say,
22 well, the President has the ability to promulgate an Executive
23 Order that can be applied in any situation where we feel there
24 is national security issue in a criminal prosecution to define
25 a statute in the way we want.

1 THE COURT: Okay. Let me ask you. Let's say I deny
2 your motion. Then how would you put forward jury instructions
3 on the definition of "unauthorized"? What would be the
4 definition?

5 MR. BOVE: Well, it will -- it would -- assuming we
6 were to get there, it would absolutely include language about
7 the significance of the Presidential Records Act, the
8 definition of personal records, and the impact of a designation
9 by a former president of those records as personal. It would
10 be -- it would have additional legal content based on the PRA
11 which we're -- we would be entitled to to support our defense
12 theory. We would be -- but what we would be doing there --

13 THE COURT: The Special Counsel would say all it needs
14 to say is that you lacked a security clearance and you lacked a
15 need to know because you were no longer president.

16 MR. BOVE: And so what is that, other than to say: We,
17 the Executive Branch, we, the Special Counsel, feel that you
18 didn't have a need to know. We're going to say that to the
19 jury. There is no standard to govern "need to know," and so
20 you're guilty.

21 THE COURT: Well, it's in the Executive Order. It's in
22 the Executive Order, and that would be applicable to former
23 presidents unless withdrawn.

24 MR. BOVE: It's -- the phrase "need to know" is in the
25 Executive Order. But the Court can't save an

1 unconstitutionally vague statute by looking to an impermissibly
2 vague and standardless term like "need to know." And there is
3 no authority defining that term in a meaningful way that
4 prevents arbitrary enforcement.

5 I know I have hit that a few times this morning, but I
6 think it's really important, and I don't think it's discussed
7 in any of the -- the decisions that we're talking about, is
8 that when a court -- when a court sort of drags into the
9 analysis Executive Order 13526, you are incorporating that
10 "need to know" concept. And if it had standards, if there was
11 a mechanism to truly define it, then that is -- it's possible
12 it could help. You would still have the nondelegation issue
13 that we have raised, but it's possible it could help. But the
14 definition is not sufficiently specific to ward off arbitrary
15 enforcement or to allow somebody in President Trump's position
16 to understand which way, for example, the CIA is going to come
17 out on "need to know" on a particular document.

18 THE COURT: Do you know if the Executive Order speaks
19 to termination of clearances and suspensions of existing
20 clearances?

21 MR. BOVE: Not off the top of my head.

22 THE COURT: Okay. All right. Well, then, unless you
23 have anything further -- and I may come back to you -- I would
24 like to hear from the Special Counsel.

25 MR. BOVE: The only other point that I want to raise is

1 on the NDI element. The point here, Judge, is that the
2 classified discovery discussed in our -- the -- our filings,
3 the classified filing, reflects that there is confusion within
4 the agencies about what constitutes NDI and whether a
5 particular document contains NDI. It's more than confusion.
6 There is dissent. And that further supports our argument when
7 you have -- the government authorities responsible for applying
8 these concepts can't agree on it.

9 THE COURT: But there has been a fair amount of
10 litigation, I think, on the defense information prong. And
11 that one of the three really has, I think, the most case law
12 support. So it would be hard to say, based on the current
13 state of decisional authority, that that prong, in and of
14 itself, is unconstitutionally vague.

15 MR. BOVE: I can't fight with the way that Your Honor
16 phrased that. I think that that's right for whatever that is
17 worth. I think it's right. But all of that case law turns on
18 this invented concept of closely held. And in this case --

19 THE COURT: Well, that comes from Gorin, which really
20 rests on secrecy. So it's not really invented.

21 MR. BOVE: What I'm saying is that -- I should have
22 said it better, Judge, thank you. There is no basis for that
23 in the statutory text. There is -- that is completely
24 invented, relative to what the statute says.

25 And our argument here on vagueness grounds with respect

1 to the NDI element is not limited to the fact that some of
2 these materials appear to have been sourced from public
3 information. That's more of a factual issue that's tied up in
4 the motions to compel, and if we made it to a trial, that would
5 be a part of our presentation.

6 But on the NDI element, I don't think that the "closely
7 held" component mitigates the concern that we have. This is
8 our concern on -- on the NDI element. Courts have taken this
9 phrase "National Defense" -- and this is foreshadowed in Gorin
10 and by Judge Hand in Heine -- and broadened it out into
11 basically anything. And that's evident from the government's
12 papers, where I -- I think the position is, essentially, if it
13 was presented to the President at some point, then it's
14 National Defense information. I -- I think --

15 THE COURT: Well, I think -- I think they're relying on
16 multiple categories, specified in the Section 10, not just the
17 presentation of the documents to the President.

18 But let me ask you: On the Count 19 issue, you sought
19 discovery specifically on what? And have you obtained any of
20 it?

21 MR. BOVE: We -- we sought discovery on the
22 communications that led to the memoranda that is -- memorandum
23 that is discussed in our papers, the process that led the
24 Energy Department to suddenly, post-indictment, write up this
25 document that says we retroactively terminate the clearance.

1 We sought those communications. We have sought any records of
2 data --

3 THE COURT: I guess that's my question. Why in the
4 case of the Q clearance is there official documentation
5 retroactively suspending it post-indictment? But just gets to
6 my earlier question: With the other counts, does the
7 clearance, just by operation of law, disappear?

8 MR. BOVE: The answer is they have not disclosed these
9 things in discovery, so I don't know.

10 The Q clearance, the reason that it is discoverable and
11 favorable to the defense is that, to Your Honor's point,
12 relative to the other documents and the other clearances at
13 issue, this type of thing didn't happen. And it's also to
14 the -- to the extent that count is going to survive our motion,
15 and we -- to the extent we were going to have a trial that
16 involved the document in Count 19, we would be permitted to
17 cross-examine people about the -- the decision that was made to
18 retroactively delete this clearance off the books, especially
19 relative to the John Brennan statement that I talked about from
20 the indictment, where former government officials are permitted
21 to retain clearances. And that's why part of our discovery
22 request is for the Energy Department's treatment of other
23 presidents and officials with Q clearances. And so I think,
24 first --

25 THE COURT: So, so far you have made that request. And

1 the answer was: You're not entitled -- it's not discoverable
2 because?

3 MR. BOVE: I'm not sure that sentence was completed. I
4 think that there was also --

5 THE COURT: Well, I'm sure that it was. But I will ask
6 the Special Counsel exactly what the position is on discovery
7 with respect to the Q -- to the Q clearance.

8 MR. BOVE: Part of it, part of the response in the
9 motion papers was an indication of privilege
10 without providing --

11 THE COURT: Deliberative process on the internal
12 communications.

13 MR. BOVE: Without providing a privilege log. And it's
14 a privilege that cannot stand when it's up against Brady and
15 Giglio.

16 THE COURT: Assuming those internal communications
17 contained such information. And the Special Counsel has
18 indicated, I think, multiple times that it's in compliance with
19 Brady and Giglio obligations. But I will cover that with the
20 Special Counsel in my discussion with him.

21 MR. BOVE: Judge --

22 THE COURT: What about the facilities? Because I
23 understand the Executive Order also speaks to protected
24 facilities, and that there has been a -- there is an
25 outstanding request for discovery on that topic.

1 Can you bring me back to the request that is on the
2 table, and what is the status of -- of your -- of your request?

3 MR. BOVE: So the request touches, I think, on two
4 issues -- one is secure facilities at President Trump's
5 residences, and the other is facilities used to provide
6 briefings to President Trump as candidate, as President-elect,
7 and then as President post-inauguration.

8 So there is two related requests, and what we're asking
9 for there is information about the -- the documented details
10 that made people comfortable that these briefings could be
11 provided under the conditions that they were provided, because
12 we are permitted, if this case goes forward, at trial, to argue
13 that all -- President Trump's training with respect to
14 classified information handling happened on the job. And if
15 what happened in front of him was that he was repeatedly shown
16 documents in these -- in, for example, at Mar-a-Lago, or at
17 Bedminster under circumstances that the government approved,
18 then that is evidence that is admissible to show that President
19 Trump did not have -- willfully violate anything, because he
20 was handling --

21 THE COURT: Do you know who would have custody of any
22 documentary evidence related to the secure facilities at
23 residences or in secure locations?

24 MR. BOVE: There is a White House component that is
25 discussed in our motion to compel papers. And then there is a

1 witness who is also discussed in our motion to compel papers
2 who provided -- there is two, really, who provided these
3 briefings. And both that agency and those witnesses can speak
4 to, and I submit, have emails relating to: Is it permissible
5 to give these briefings under these circumstances?

6 THE COURT: Would that be relevant, the secure nature
7 of the facilities? Would that be relevant to the three
8 elements under -- for Counts 1 through 32?

9 There are references in the indictment to the -- to the
10 lack of secure facility where the boxes were allegedly kept.
11 But is it strictly relevant to the three elements that are
12 necessary for proof of Counts 1 through 32?

13 MR. BOVE: I think that this evidence could potentially
14 bear on the Authorization Clause. But our theory in the motion
15 to compel papers is that it would be most directly relevant to
16 President Trump's state of mind, because the circumstances
17 under which briefings were conducted prior to him leaving
18 office informed his view about how the appropriateness and
19 the -- of how to handle classified information after his
20 presidency.

21 THE COURT: But you're not sure whether the Executive
22 Order itself speaks to protected or secure facilities?

23 MR. BOVE: I think that there is language right around
24 Section 4 that touches on that issue, Judge.

25 THE COURT: And your understanding of the superseding

1 indictment is that it does require resort to the Executive
2 Order in order to fill in content for the "entitled to receive"
3 clause and the "unauthorized" clause.

4 MR. BOVE: And the NDI Clause, because I think a big
5 part of their argument is that the classification status of the
6 documents, the alleged sensitivity of the documents -- this is
7 them talking, not me -- makes it more likely that the defendant
8 understood that these things constituted NDI. And I think, on
9 that issue, in the -- the use of the Executive Order to define
10 the NDI element, you have to look at Section 1.4 of the
11 Executive Order, which defines the categories of classified
12 information that are subject to the order. And it's much
13 broader than the concept of National Defense.

14 THE COURT: Okay. All right. Thank you. It's been
15 some time now that we have been discussing. So let me turn to
16 hear argument from either Mr. Harbach or Mr. Bratt, whoever
17 will be taking the lead on this particular opposition.

18 MR. BRATT: Thank you, Your Honor. Good morning.

19 THE COURT: Good morning.

20 MR. BRATT: So I will just start with an overview of
21 our position, and then I will turn to some of the specific
22 issues, both that Mr. Bove raised, and answer some of the
23 Court's questions.

24 The former president's as-applied challenge to 793 here
25 is really no different from the many others that have come

1 before other courts, that have been unsuccessful, and this
2 challenge should fail for the same reasons.

3 THE COURT: Do you believe it's premature because it
4 relies on facts outside of the indictment?

5 MR. BRATT: So with respect to their PRA argument --
6 and I can address that right now -- I would say as to that, not
7 only is it premature as to that aspect, I do think that the
8 Court can rule as a legal matter with respect to the three
9 prongs or the three statements that are -- elements that are in
10 793 that they allege are -- that they allege are vague, that
11 the Court can, as a legal matter, rule on those.

12 But with respect to their PRA claim, and their claim
13 that the former president designated these records as personal,
14 not only is it premature, but for Rule 12 purposes, it never
15 happened. And, actually, what is in the indictment as to how
16 the former president viewed these documents is to the contrary.

17 And I would direct the Court's attention to
18 paragraph 35 of the superseding indictment, ECF Number 85,
19 particularly on page 16. And just toward, sort of, the middle
20 of that page, the former president -- and this is at
21 Bedminster, in the summer of 2021, July of 2021. And he is
22 speaking to a publisher of his former chief of staff's memoir
23 and the ghost writer, and he has a couple of aides present.

24 And just starting where it says:

25 "TRUMP: This was done by the military and given to me.

1 I think we probably -- we can probably, right?

2 "STAFFER: I don't know. Well, we will have to see.

3 Yeah, we will have to try.

4 "TRUMP: Declassify it:

5 "STAFFER: Figure out -- figure out a -- yeah.

6 "TRUMP: See, as president, I could have declassified
7 it.

8 "THE STAFFER: Yeah.

9 "Now I can't, you know, but this is still secret."

10 He doesn't say there, I can show you this because I
11 designated it as personal. In fact, he is saying the exact
12 opposite, that these are presidential records, core
13 presidential records that he has custody of, and that they
14 remain classified.

15 Mr. Harbach will be handling most of the PRA argument,
16 but I will touch on a couple of things as it relates to the
17 vagueness claim. It is our position -- and I think actually if
18 you look at the PRA, the PRA reinforces the notice to the
19 former president that what he was doing is illegal.

20 The clarity of the definitions in the PRA of what is
21 personal and what is presidential, they undermine the claim he
22 is making that he was not on notice, that he could keep these
23 documents.

24 They have some very black-and-white definition of what
25 is a presidential record and a personal record. And I would

1 just like to take a moment, Your Honor, to read to you what is
2 in 44 U.S.C. Section 2201(2), which is the definition of a
3 presidential record.

4 The term "presidential record" means
5 any document -- all documentary materials or any reasonably
6 segregable portion thereof, created or received by the
7 president, the president's immediate staff, or a unit or
8 individual of the Executive Office of the president, whose
9 function is to advise or assist the president in the course in
10 conducting activities which relate to or have a -- or have an
11 effect upon the carrying out of the constitutional, statutory,
12 or other official or ceremonial duties of the president.

13 And then by contrast, personal records, in 2201(3), the
14 term "personal records" means all documentary materials or any
15 reasonably segregable portion thereof, of a purely private or
16 nonpublic character which do not relate to or have an effect
17 upon the carrying out of the constitutional statutory or other
18 official ceremonial duties of the president.

19 It would do violence to the text of these provisions to
20 say that a president can simply, by fiat, make what the law
21 requires to be a presidential record a personal record.

22 These are all documents that he did not create, they --
23 as we say and as they admit, they were provided to him in the
24 course of sensitive briefings. I would -- there is nothing in
25 the PRA that says a personal record by definition cannot

1 contain classified information or cannot be subject to
2 18 U.S.C. 793.

3 And, in fact, the PRA does anticipate that even a
4 personal record can contain information in it that is
5 presidential or even classified. That's the importance of the
6 use of the term "segregable."

7 THE COURT: And I very much appreciate these arguments.
8 I do want to consider them, certainly, but -- in the context of
9 the vagueness challenge, and then we can turn to the PRA. I
10 just -- I'm trying to keep the analysis a little more organized
11 here with respect to the challenge clauses.

12 So if you could just root your argument in the
13 vagueness challenge, that would be helpful.

14 MR. BRATT: Yes. And the way I'm trying to root it,
15 Your Honor, and probably maybe not as well as I could, is that
16 on the whole issue of fair notice, that you have to look at
17 everything that is alleged in the indictment, everything that
18 is on the books and the law, and that the PRA, rather than
19 undermine -- or supporting his claim, that he could take these
20 documents without any consequences, actually reinforces the
21 notice to him that he could not do so.

22 THE COURT: Okay. But it is uncontested, of course,
23 that no former executive or former vice president had ever
24 been -- had ever been -- been faced with or exposed to criminal
25 liability for retaining personal or presidential records.

1 MR. BRATT: None has been charged.

2 Just in answer to the Court's question about criminal
3 referrals, there was a criminal referral from NARA with respect
4 to President Biden. There also was a criminal referral from
5 NARA to the Department of Justice with respect to Former Vice
6 President Pence. So there were other referrals.

7 THE COURT: Those postdated --

8 MR. BRATT: Postdated this; right.

9 THE COURT: Okay. So there wouldn't have been, I
10 guess, a historical example for the former president, at least
11 to say, well, there is a -- there is a realistic likelihood
12 here that I could be looking at a 793(e) indictment?

13 MR. BRATT: There hasn't. But I would add that there
14 was never -- even with other former presidents, there was never
15 a situation remotely similar to this one.

16 THE COURT: So then I guess that gets me to the whole
17 "when was the crime complete?" Because the way the time period
18 is alleged in the indictment is, starts on January 20th of
19 2021 -- correct me if I'm wrong -- and it runs through the date
20 of the search; is that correct?

21 MR. BRATT: Well, it -- there -- so there are three
22 different stop points. And one, I think as a legal matter,
23 retention is an ongoing offense, it continues -- it's a
24 continuing offense until it stops.

25 THE COURT: But, conceivably, you could have charged it

1 on January 30th, and you would have had a week of unlawful
2 retention under the theory charged in the indictment; correct?

3 MR. BRATT: That's correct.

4 THE COURT: Okay. So then that's my question, is that,
5 if that's the theory and you -- and the crime is complete, then
6 wouldn't that have been applicable to other officials who, I
7 think, it's undisputed have possessed classified information
8 post-presidency, and done so through willful actions?

9 MR. BRATT: So I think it's the willful part that
10 becomes harder. And that really goes to, what is the proof
11 that the government would have to prosecute a former president
12 or former official who retained documents?

13 And the Court may have read the Hur report, but that
14 certainly is a big part of the Hur report's discussion as to
15 whether or not President Biden's conduct was willful or whether
16 they could prove beyond a reasonable doubt that it was willful.

17 I don't have insights into what my former colleagues
18 decided with respect to Former Vice President Pence. But those
19 are all, certainly, facts that bear upon whether or not there
20 was a charge -- there would be a charge.

21 THE COURT: But based on the simple willfulness that --
22 that is permitted, you could have willfulness on January 21 of
23 2021; correct? Because at that point, your position has
24 ceased. You -- a lack of clearance and -- you lack a
25 clearance, and you lack a need to know, correct, and,

1 therefore, it's unauthorized, and you took them willfully, and
2 they contain National Defense information?

3 So all of the elements are satisfied and the crime is
4 complete as of January 21, 2021?

5 MR. BRATT: That as a -- as the Court states it,
6 correct, that is correct.

7 THE COURT: And then there is no tension with that
8 position and the absence of any criminal prosecutions for
9 possession of classified information post- -- postposition?

10 MR. BRATT: So I think the Court -- the Court's
11 question would be an important one if the indictment was
12 returned on January 30th, 2021, but it wasn't. It was
13 returned -- with the history of everything that happened
14 beginning in May of 2021, the return of only 15 boxes, the
15 failure to comply with -- fully comply with the grand jury
16 subpoena, the false declaration that was submitted, the
17 evidence of obstruction, all of that is what brings --

18 THE COURT: And I think all of that is -- is -- is
19 adequately pled in the obstruction counts, but for the
20 retention counts, it just struck me as interesting that the
21 period of time starts when it does. Because at that point,
22 there is -- there is no demand for the documents.

23 MR. BRATT: And, again, that's partly why
24 the -- the -- there is no charge as of January 21st,
25 January 30th, 2021.

1 You have to look at the entire conduct. And, yes, what
2 you're saying is what we are alleging relates to the
3 obstruction charges, but that's also key proof of willfulness.

4 And to return to the Court's question, the Court's
5 comment, the -- B9 is the -- what appears to be the
6 11th Circuit's distillation of the Bryan standard, which is
7 what the courts have routinely used in 793 prosecutions.

8 And I would say the Bryan standard is -- I know
9 sometimes the term "simple willfulness" is -- is applied to it,
10 and I think that's to differentiate it from the Ratzlafv/Cheek,
11 sort of --

12 THE COURT: Correct.

13 MR. BRATT: -- sort of willfulness. But there is also
14 another, sometimes, definition of willfulness, which is just
15 doing something advertently, or not by mistake.

16 And the Bryan standard does require us to prove that
17 when the former president took the documents, he did so with
18 the knowledge that it was illegal to do that.

19 THE COURT: Illegal. So -- just so we get to that
20 definition, where it says "with the intent to do something, the
21 law forbids..."

22 And my question is: Which law is captured there?

23 MR. BRATT: So under Bryan -- and, again, we're not --
24 obviously, we're very far from the charging stage, and so we
25 would certainly give the Court language that would be more

1 refined than what I'm about to say now. But what we usually
2 have in our instructions to flesh out the meaning of Bryan is
3 that a defendant does not need to know the specific law that he
4 is charged with violating, but he has to know in a general
5 sense, general knowledge that what he is doing is illegal. He
6 doesn't have to --

7 THE COURT: But illegal because it's -- because it's a
8 violation of 793(e) or it's illegal because it's in violation
9 of the Executive Order?

10 MR. BRATT: 793(e), the prohibitions in 793(e), which
11 aren't formed, though, by the Executive Order.

12 THE COURT: Okay. So then do you see any issue with
13 the fact that 793(e) does not incorporate or otherwise
14 reference the Executive Order; it just says "entitled to
15 receive it"?

16 MR. BRATT: So let me spend a moment on the "entitled
17 to receive" prong, because -- and I think the Court was getting
18 to some of the issues with that. But the cases that we go back
19 and forth on, and particularly the Rosen case, those all dealt
20 with the transmission prong of 793(e).

21 So there, it's really -- it is part of the actus reus
22 that the person to whom you transmit the information, be it a
23 reporter, be it a friend -- we have a subset of cases where
24 people are giving it to boyfriends or girlfriends to advance
25 their careers. Part of the actus reus is that the person to

1 whom you give it is not entitled to receive it.

2 The point that we were making in footnote 6 of our
3 brief, and which I can amplify upon, is that in this case, the
4 entitled-to-receive language is not part of the actus reus.
5 The offense here is that he failed to return it.

6 So in many ways, you don't even have to focus anymore
7 on the "entitled to receive."

8 THE COURT: Failed to return it to who?

9 MR. BRATT: To the official entitled to receive it.

10 THE COURT: Which would have been?

11 MR. BRATT: NARA would have been one.

12 THE COURT: But that's -- so as of January 21, the
13 crime at that point is, you would have returned it to NARA at
14 that point, day -- day after presidency ends?

15 MR. BRATT: As the PRA is written by -- as a matter of
16 law, the ownership of those documents transfer to NARA.

17 THE COURT: Okay. So NARA is the official contemplated
18 to whom the former president would have returned the documents?

19 MR. BRATT: Under the facts of this case. There is
20 also returning them to the FBI via the grand jury.

21 THE COURT: Post grand jury.

22 MR. BRATT: Correct.

23 THE COURT: Okay.

24 MR. BRATT: But, you know, where -- that's not this
25 case, and it would be almost an absurd situation.

1 But let's say that things had turned out differently,
2 that the former president realized that he had these documents
3 in a storage room and decided, oh, I've got to give these back,
4 and rather than calling NARA or calling the Department of
5 Justice, he called, say, the then leader of the Republicans in
6 the House and say, hey, I've got these documents. I want to
7 return them to you. And somebody is arguing that was not the
8 official entitled to receive them.

9 Again, that's not a case I think anybody would charge,
10 but that's how the "entitled to receive" language would play
11 out in a prosecution if there were an incorrect return. But in
12 our case, the element really gets satisfied through the proof
13 of the failure.

14 THE COURT: But it does -- it does require or resort to
15 the Executive Order, you would agree?

16 MR. BRATT: Yes. And in -- to just address a couple of
17 questions that the Court had for Mr. Bove. First of all, a
18 president never receives a clearance, just as Your Honor does
19 not receive a clearance. So there is not a situation where a
20 clearance is suspended. The DOE situation, which I can talk
21 about a bit more, is different. They do something on their
22 books. But with respect to all of the other classified
23 information, classified documents that a president sees during
24 his term, there is no clearance. So there is no clearance to
25 suspend at the end of one's term.

1 THE COURT: Is there a statute that, kind of as a legal
2 matter, nullifies or negates the preexisting clearance?

3 MR. BRATT: So, again, there -- there never was a
4 preexisting clearance. And I -- I don't want to talk past
5 Your Honor. But it's not that -- so, really, the part of the
6 Executive Order that comes into play -- and we've mentioned
7 this -- is Section 4.4. It addresses what a former president
8 can do vis-à-vis classified information post-presidency. And
9 that -- and I will just add that the fact that there was 4.4 in
10 terms of notice, fair notice of what one can and cannot do, it
11 actually makes a former president unique among the people whom
12 we otherwise end up prosecuting for 793(e) -- government
13 contractors or government employees. Because there is in the
14 Executive Order express language limiting what he can and
15 cannot do.

16 THE COURT: Do you see a problem with the fact that the
17 statute really doesn't reference any Executive Order, and it
18 doesn't -- it doesn't authorize rulemaking?

19 MR. BRATT: Well, so, two things. One, the Executive
20 Order itself is law, and so it is -- it's law. It's on the --

21 THE COURT: Correct. But it's not referenced in the
22 charge in 793(e).

23 MR. BRATT: And --

24 THE COURT: So if you're just a regular person trying
25 to figure out if you are going to run afoul of 793(e), how

1 would you know that you have to go look up the Executive Order,
2 and which one?

3 MR. BRATT: So, you know, as a matter of -- again, sort
4 of the Bryan line of cases, one cannot -- if something is on
5 the books, that awareness of it is imputed to you. That is not
6 the type of willfulness that -- that we have to -- have to
7 apply. So there is a law that makes it illegal, that law is
8 informed in parts by the Executive Order, which is out there
9 for anybody to see. In Rosen and in other cases, the Courts
10 have upheld limiting or narrowing the statute or clarifying it
11 by reference to the Executive Order. So all of that, that
12 entire mixture is entirely consistent with Fifth Amendment due
13 process jurisdiction in vagueness cases.

14 THE COURT: Does it reach a point where you say that
15 it's just too much, it's just too much addition? It's okay if
16 you are adding the closely held, because that's -- goes hand to
17 hand with the secrecy language in Gorin. But beyond that,
18 courts bring in the Executive Order to add content to what is
19 otherwise not referenced. Does it reach a point, really, in
20 the -- in the explication of the statute, where it becomes
21 just -- just too much judicial gloss?

22 MR. BRATT: So as long as the glosses are narrowing the
23 reach of the statute, no. And that actually -- and we cite
24 Skilling for that proposition. But even, you know, they --
25 they spent a lot of time talking about, you know, the Davis,

1 Johnson, Dimaya line of cases. And just to quote from
2 Justice Gorsuch in -- in Davis. This is at 139 Supreme
3 Court 233: "Applying the constitutional avoidance to narrow a
4 criminal statute, as this Court has historically done, accords
5 with the rule of lenity."

6 THE COURT: So what do you say to the contrary view,
7 which is that the Executive Order is standardless and,
8 therefore, doesn't limit?

9 MR. BRATT: If you look at 4.4, that language is very
10 clear. There is nothing standardless in that.

11 THE COURT: Could you walk me through the standards
12 that you see in 4.4?

13 MR. BRATT: Yes.

14 Excuse me, Your Honor, I thought I brought everything I
15 needed up here.

16 So 4.4, beginning at -- which is titled, Access by
17 Historical Researchers and Certain Former Government Personnel.

18 THE COURT: Okay.

19 MR. BRATT: 4.4(a): The requirement in
20 Section 4.1(a)(3) of this order that access to classified
21 information may be granted only to individuals who have a need
22 to know the information may be waived for persons who -- in
23 Sub 3 -- served as president or vice president.

24 And then it continues in (b): Waivers under this
25 section may be granted only if the agency head or senior agency

1 official of the originating agency, (1) Determines in writing
2 that access is consistent with the interests of national
3 security; (2) Takes appropriate steps to protect classified
4 information from unauthorized disclosure or compromise, and
5 ensures that the information is safeguarded in a manner
6 consistent with this order; and then (3) Limits the access
7 granted to former presidential appointees.

8 And actually, (3) really does not apply here.

9 So 4.4 is quite clear about how a former president has
10 access to and, essentially, where the former president would
11 have access to classified information post-presidency.

12 THE COURT: And then the "need to know" definition
13 comes from?

14 MR. BRATT: So "need to know" comes from 4.1. But as
15 it says here, the "need to know" is waived under these
16 circumstances.

17 THE COURT: So you would never have to go look up the
18 definition of "need to know" under the Executive Order, which I
19 think is Subsection (dd), if I'm not mistaken?

20 MR. BRATT: You're correct, Your Honor.

21 So using the as-applied analysis as applied to the
22 former president, that's correct.

23 THE COURT: Okay. So no -- no need to resort to (dd)
24 under -- under this argument. Okay.

25 Let's say you did resort to (dd), what are the

1 standards in (dd) to know? If you're really trying to plan
2 your conduct and foresee the potential for criminal liability,
3 then how would you know?

4 MR. BRATT: So contrary to how Mr. Bove describes it,
5 those words are susceptible to ordinary dictionary definitions,
6 and, particularly, the word "need."

7 THE COURT: Uh-huh.

8 MR. BRATT: So there has to be some demonstrated reason
9 for having it, some demonstrated justification for having it.
10 And so I would not concede at all that those terms are vague.
11 I think some of the arguments we've made in the motion to
12 compel arise in a different context, and we are using that term
13 in a different context. But that does not affect the vagueness
14 analysis as to 793, as applied to the former president.

15 THE COURT: Okay. So what -- in the jury instructions,
16 hypothetically, in this case, how would you define
17 "unauthorized," and how would you define "entitled to receive"?

18 MR. BRATT: So I'm going to have to say, Your Honor, I
19 really don't want to cobble something together as I'm just
20 standing here.

21 THE COURT: Okay. Okay.

22 MR. BRATT: We can provide briefing for you on that,
23 and I'm sure that we would have opportunities in the future to
24 do that. So I would, I guess, ask the Court's --

25 THE COURT: Well, it -- the analysis of the vagueness

1 challenges kind of invariably leads me to wonder, well, okay,
2 how will these terms be defined for the jury who will be having
3 to apply these terms? And then, are we going to be looking at
4 such diametrically opposed definitions of these terms that it
5 will -- it will be hard to reach a consensus?

6 MR. BRATT: So we certainly will be looking at other
7 793(e) charges that have been given. We will look at the facts
8 of this case. And we will brief it for the Court and come up
9 with an instruction that we believe is legally sufficient and
10 appropriate for the facts of this case.

11 THE COURT: Okay. All right. So let's make sure we
12 haven't overlooked any of the clauses. I think we've talked
13 about "unauthorized" and how it, on the government's view,
14 tracks the Executive Order. Same with the "entitled" clause;
15 is that correct?

16 MR. BRATT: Right. And, again, under the unique
17 circumstances of a failure to deliver, a lot of that language,
18 in many ways, drops out of the case.

19 THE COURT: But from the statutory text, why does it
20 drop out? Because if we look at the original language that I
21 started this hearing off with Mr. Bove, it does -- it does
22 contain the charge, and I believe the indictment does as well.

23 MR. BRATT: Yes, it does. But our proof is there was a
24 failure to return. So we don't have to postulate to whom it
25 would have been returned to satisfy the statute.

1 He never did it. So we don't really get into the
2 question of who was entitled to receive it.

3 THE COURT: Okay. All right. Let's see, then.

4 All right. So you would agree, of course, during the
5 presidency, the access is authorized?

6 MR. BRATT: Yes.

7 THE COURT: Okay. So then it became unauthorized --
8 just correct me if I'm wrong -- the moment the presidency
9 ended?

10 MR. BRATT: And he had removed the documents, correct.

11 THE COURT: Okay.

12 MR. BRATT: Yes.

13 THE COURT: So in terms of the indictment, the lack of
14 authority, does it stem from the absence of a clearance alone,
15 or is there some other source for the lack of authority?

16 MR. BRATT: So, certainly, he doesn't have a clearance.
17 So that -- that's part of it.

18 THE COURT: And that's because the clearance vanishes,
19 effectively, when the presidency ends? Is that how it works?
20 I'm just not familiar.

21 MR. BRATT: I would say that -- the way I would say it
22 is that the lawful access ends at the end of the presidency,
23 because there is not a clearance that is granted during the
24 course of the presidency.

25 THE COURT: And there is no requirement that there be a

1 demand for the documents in order for the retention to be
2 unlawful; is that correct?

3 MR. BRATT: Unlike (d), where the unlawful activity is
4 predicated on there being a failure to return on demand; under
5 (e), that's correct.

6 THE COURT: Okay. Are you familiar with any cases
7 where you have this, sort of, there was authority, and "then
8 the authority was lost" type scenario?

9 MR. BRATT: So we have cases where individuals have
10 taken classified with them after their employment ends, and in
11 many instances, they no longer have a clearance. The retention
12 is unlawful for other reasons. Keeping it in one's home -- in
13 one's home is not a -- a lawful means of having possession of
14 the -- of the documents in that sort of setting.

15 But, yes, we do prosecute people who no longer have
16 their -- no longer have active clearances.

17 THE COURT: So, government employees, for example, that
18 would have had authority but then exceeded the authority, for
19 lack of a better term.

20 MR. BRATT: Right. But even when they were government
21 employees -- and this is part of our response, the factual
22 response to the Q clearance issue -- is that, even if you have
23 lawful access to it under the appropriate circumstances of your
24 job, it doesn't mean you can remove it and keep it at home.
25 I've had an active Q clearance for about 15 years. I can view

1 Q-classified materials in a SCIF. I can't take them home and
2 put them in my basement.

3 THE COURT: Certainly. Certainly. Okay.

4 Now, just again drilling down on the authority piece,
5 are you familiar with any cases where courts have had to define
6 the term "lack of authority" or "unauthorized" without a
7 statutory definition?

8 MR. BRATT: For 793, or for any other statute --

9 THE COURT: Just any other case. Yes, I'm wondering --
10 I know, for example, in the Van Buren case, it's a CAFA
11 decision with respect to exceeding authorized access. And I
12 was just curious if there is any broadening beyond the 793(e)
13 context, is there any helpful case law to address this issue of
14 "unauthorized" when there is no statutory definition? Because
15 I know your position is we looked at the Executive Order.
16 That's not, of course, in the statute.

17 So I'm wondering what courts have done, for example, in
18 that scenario, faced without a -- faced with no statutory
19 definition of the term "unauthorized."

20 MR. BRATT: Based on the briefing that was in front of
21 us, we didn't look for those cases. We could do an analysis
22 for the Court, if that's what the Court would want. I'm not
23 aware of how -- I can't draw an analogy to a similar type of
24 statute that has "unauthorized" as part of the -- part of the
25 element for the offense.

1 THE COURT: Okay. So then I guess tell me a little bit
2 about the count -- the Count 19. What happened with that
3 count? And why -- why was there a formal clearance on the
4 books that had to be deactivated retroactively?

5 MR. BRATT: Right. So first, with respect to Count 19,
6 we have provided them discovery on it. There are some things,
7 as is clear from our papers that the Court has, that we have
8 withheld. But they have the original memorandum and the
9 original back-and-forth from, I believe it was February of
10 2017, when the -- when the former president was put on the
11 database of individuals who have -- who are authorized to
12 access Q-level material.

13 I believe that memorandum cites to a regulation that
14 gives the secretary the authority to do that, wholly apart from
15 the ordinary vetting that somebody would go through to get a Q
16 clearance. We provided that. We provided the memoranda and
17 some other materials related to what occurred over the last
18 summer. That's -- that's what we have given them.

19 THE COURT: Uh-huh.

20 MR. BRATT: And that -- and based on what we have
21 been -- has been represented to us by the Department of Energy,
22 that is essentially the world universe of materials they have
23 on that subject.

24 THE COURT: At some point, though, it was -- it was
25 discovered, correct, that this clearance still existed

1 post-indictment? So walk me through factually what happened
2 there.

3 MR. BRATT: So factually, somebody from the Department
4 of Energy notified us of this fact and of what they were going
5 to do. And, again, we produced in discovery the 302s, I
6 believe there are two 302s, of the interview with this official
7 from the Department of Energy -- of these two interviews with
8 the official.

9 THE COURT: Are there any other documents that -- that
10 would speak to the -- to the -- to the chronology here that
11 there was a clearance, technically, in the Department of Energy
12 database, but that after indictment, it was removed?

13 MR. BRATT: So, again, never say never because I can
14 get a phone call from the Department of Energy, having heard
15 about proceedings today, and said, oh, we found a few other
16 things. But putting that aside, we have produced, other than
17 the things that we have withheld, what the Department of Energy
18 has represented to us is what they have on this subject.

19 THE COURT: And what you have withheld, just so I
20 understand, are -- are what?

21 MR. BRATT: Some internal emails. There is some drafts
22 of a memorandum that were circulated within the Department of
23 Energy. Those are essentially it. It's really more of some
24 communications about a draft of at least one of the memos.

25 THE COURT: Okay. Let's see. Let's turn to the intent

1 element, willfully. Is it your position that it's the standard
2 simple willfulness that we were talking about a moment ago with
3 no extra layer of bad faith?

4 MR. BRATT: So I like to refer to it as the "Bryan
5 standard of willfulness." And that you do have to have a bad
6 purpose; that is a common Bryan instruction. But you do not
7 have to have the heightened mens rea of, say, a tax
8 structuring -- or a money structuring case. That is the
9 subject of -- it's either Ratzlafv or Cheek.

10 THE COURT: So in 11th Circuit pattern, is the word
11 "bad purpose" included?

12 MR. BRATT: So I don't have the instruction in front of
13 me. I know we have used that term, I think, in -- in the
14 discussions. I think Rosen talks about Morison -- the Morison
15 instruction. And I think at least one of the other cases
16 references an instruction that was a 793 instruction that was
17 given, that the bad purpose language was used.

18 THE COURT: Okay. No, I'm aware of B91A and 1B. One
19 contains a bad purpose reference and the other one doesn't.

20 So, okay. All right. Let's see. Anything further on
21 willfulness, in your view, as it informs the vagueness
22 challenge?

23 MR. BRATT: No. I -- I think, again, when you stack
24 everything up, the notice that the former president had, the
25 admissions that are in the indictment, the -- and I know --

1 THE COURT: And the notice that you're referring to is?

2 MR. BRATT: Is his awareness that it was illegal to
3 mishandle classified information. He made public comments
4 about that several times during the course of the -- of the
5 campaign.

6 THE COURT: But were those comments geared towards
7 a -- a president's decision or a vice president's decision
8 from -- to -- to retain documents?

9 MR. BRATT: They dealt with his opponent, Former
10 Secretary of State Clinton, who was herself an original
11 classification authority, and her having had classified
12 information on a personal server. That was the context.

13 THE COURT: Okay. So you're saying there was notice
14 based on the public comments.

15 MR. BRATT: Right. That's paragraphs 23 and 24 of the
16 superseding indictment. In their reply brief --

17 THE COURT: But just to -- just to turn back to that
18 point. So going through the notice, if you're a former
19 executive, again, trying to foresee reasonably whether you
20 would be facing criminal liability, you would see, okay, no
21 criminal liability to date, correct, for officials that had
22 classified information postposition?

23 MR. BRATT: Are you saying no prosecutions?

24 THE COURT: Correct.

25 MR. BRATT: Well, so putting aside presidents and vice

1 presidents, there have been prosecutions of other high-ranking
2 officials for their mishandling of classified information.
3 That has occurred.

4 THE COURT: Okay. But no prosecutions of executives or
5 vice presidents?

6 MR. BRATT: That is not part of the notice for purposes
7 of Fifth Amendment due process.

8 THE COURT: Well, the Ford case, for example, talks
9 about reasonable foreseeability. And so that's why I'm kind of
10 asking, you know, putting yourself in the -- in the position of
11 a former executive, trying to map out your conduct, and you see
12 sort of the constellation of what has happened historically,
13 does that factor in at all?

14 MR. BRATT: I don't think that factors in. That may be
15 relevant to willfulness, and that's certainly something that
16 the former president could testify to, should he choose to do
17 so. But as a legal matter, as to whether or not, as applied to
18 him, this statute is void for vagueness, no.

19 THE COURT: And that's because the clauses that exist
20 already coupled with the judicial glosses, you think, provides
21 adequate notice in the context that we have here under the
22 circumstances?

23 MR. BRATT: Correct. Provides adequate notice and also
24 protects against arbitrary enforcement.

25 THE COURT: How so? Can you speak to that arbitrary

1 enforcement?

2 MR. BRATT: Yes. And that's really a corollary to fair
3 notice, that if the criteria are clear, a prosecutor cannot
4 charge a case that go -- that would go beyond those criteria.

5 THE COURT: Uh-huh.

6 MR. BRATT: And that's the -- the limitation on
7 arbitrary enforcement as, you know, described in Kolender.

8 THE COURT: Well, there is a suggestion in the -- in
9 the motion and in the reply that there -- that this -- that
10 this arbitrary enforcement is featuring in this case.

11 MR. BRATT: They make the argument repeatedly that
12 decisions were made for political reasons. They have their
13 vindictive selective prosecution motion. That is wholly
14 separate from whether or not, consistent with the Fifth
15 Amendment, this indictment, these charges, provided the former
16 president fair notice.

17 THE COURT: So you don't see any relationship to the
18 arbitrary enforcement component of due process?

19 MR. BRATT: If there are knowable and clear criteria to
20 guide the decision of what the elements are to charge, that is
21 both adequate notice and that guards against arbitrary and
22 capricious enforcement.

23 THE COURT: Okay.

24 MR. BRATT: And I would add one other important
25 as-applied factor in this case, which is -- which is in the

1 indictment, which is that they make -- they sort of brush it
2 off in the -- in their reply brief, but the nature of these
3 documents, as alleged in the superseding indictment, did
4 put -- and this is very important for an as-applied
5 challenge -- and both Hitselberger and Kim talk about the
6 nature of the -- of the documents, what the defendants in those
7 cases would have seen, the top secret, and many cases here, the
8 SCI compartments, the special access programs, all of that in
9 an as-applied case, those are important factors in whether or
10 not these charges are vague as to him.

11 THE COURT: Given the sensitivity?

12 MR. BRATT: Correct. Correct.

13 THE COURT: Okay. Does it matter, for purposes of
14 assessing this foreseeability concept I have mentioned, that
15 there is no criminal enforcement mechanism in the PRA itself?

16 MR. BRATT: No. No. Not at all. Because those are,
17 again, entirely separate statutes. And, if anything, the PRA
18 puts them on greater notice that what he was doing was not
19 lawful.

20 THE COURT: Does it matter that there is case law --
21 and I know this is subject for our next motion -- but that
22 presidential decisions with respect to designating documents as
23 presidential or personal, in some references in case law, have
24 been characterized as effectively unreviewable?

25 MR. BRATT: So we're not in a judicial review situation

1 here. These are charges in an indictment. And it will be for
2 the jury to decide, based on the facts that come out and the
3 testimony of witnesses, as to whether or not there was a
4 violation. This is not --

5 THE COURT: I guess what I'm saying, though, is if --
6 again, if you're putting yourself in the mind of an executive
7 trying to foresee the criminality, potentially, of conduct, and
8 you say, okay, there has been no president or vice president
9 ever charged with possessing classified information
10 post-presidency, and there is no criminal enforcement mechanism
11 in the PRA, and there is some case law that says that it is
12 unfettered discretion, and I was the original classification
13 authority for the documents, is there not a point at which one
14 would say it would not have been reasonably foreseeable, given
15 that landscape, to expect criminal liability?

16 MR. BRATT: So I don't think that sort of analysis --
17 that goes beyond the Fifth Amendment due process.

18 THE COURT: That's a willfulness argument?

19 MR. BRATT: That's a willfulness argument; correct.

20 THE COURT: Okay.

21 All right. Now, just to be clear, there is no NDA that
22 was signed, of course, by a former president, so you wouldn't
23 have that sort of fact in a case?

24 MR. BRATT: That's correct.

25 THE COURT: Okay. And then -- okay, so just -- my last

1 question really is just walk me through the set of judicial
2 glosses that you have to -- you have to cobble together. And I
3 know this -- there is at least a closely held component. I
4 want to make sure I understand the full set of extras that
5 we're talking about.

6 MR. BRATT: And I guess I would not agree -- I would
7 respectfully take issue with the term "cobbled together." But
8 what --

9 THE COURT: Well, beyond the text, let's say.

10 MR. BRATT: Sure. There is the gloss that Gorin and
11 Heine put on, that the -- the definition of relating to the
12 National Defense, what National Defense information is. There
13 is the closely held narrowing that also comes from these two
14 cases that Campa defines as what the government endeavors to
15 keep from the public.

16 And I just want to pause for one second because just
17 because Campa arose in a context of sufficiency of the
18 evidence, that evidence was sufficient because Campa adopted
19 the Gorin definition.

20 THE COURT: I think you're correct about that.

21 MR. BRATT: There is also the use of the Executive
22 Order to define entitled to receive, and it also bears on
23 unauthorized -- unauthorized possession. There is also -- and
24 we can discuss --

25 THE COURT: So without the Executive Order, would you

1 have a vagueness problem?

2 MR. BRATT: I -- I -- I don't think so. Because I
3 think, with respect to unauthorized possession, as the Court
4 correctly said, the starting point is the plain language of the
5 text, and the ordinary dictionary definitions that a -- of
6 those terms, so I don't think so.

7 THE COURT: So let's talk about the definitions. There
8 is some dispute here that you've added the word "official," and
9 that it doesn't really come from the definitions.

10 What is your response?

11 MR. BRATT: We quoted -- and I can double-check. We
12 did cite-check our briefs. We cited from Black's Law
13 Dictionary; I think, Random House; maybe -- I forget what the
14 third one is. So those are -- the terms that we used, I
15 believe, came from dictionaries.

16 THE COURT: I would have to go back and see whether the
17 word "official" was there.

18 MR. BRATT: I think that's the Black's Law definition
19 that we used.

20 THE COURT: Okay. Well, I don't want to delay things.
21 So, okay.

22 All right. Going through the list. So we've talked
23 about "closely held." There is a great bit of law on that
24 prong.

25 The "entitled to receive" and the "authorized," you say

1 comes from the Executive Order and then, the ordinary
2 definition --

3 MR. BRATT: Correct.

4 THE COURT: -- of lack of official permission?

5 MR. BRATT: Well, but also, here -- I'm looking
6 at -- I'm looking now at our brief. So the -- we do not -- I
7 don't -- we're not quoting. We don't have quotation marks
8 around the Black's Law dictionary. But from Random House, we
9 say defining "authorization" as, quote, "permission or power
10 granted by an authority." And then from Webster's Third
11 International, defining "authorized" -- quotes -- to quote,
12 "endorse, empower, justify, permit by, or as if by some
13 recognized or proper authority."

14 THE COURT: Permission granted by authority. Okay.

15 MR. BRATT: Yes.

16 THE COURT: All right. And then any other glosses that
17 one would need?

18 MR. BRATT: There is also -- and we can put to another
19 day and brief whether or not the Court should apply it. But
20 there is the Morison clause, the potential for harm, which the
21 4th Circuit has adopted.

22 THE COURT: What's your view on that?

23 MR. BRATT: My view on that is we will -- we will give
24 you something at a -- at a -- at a later date as to how that
25 may or may not apply to this case.

1 THE COURT: How do you not have a view about that?

2 MR. BRATT: So some of it has to deal with a --
3 National Security Division policy of how we look at these
4 cases. We have -- not -- we have advocated the courts not to
5 use it, but there were certain circumstances about those cases
6 where it made sense to do so. So I -- I am reluctant to commit
7 to a position standing in front of you today, Your Honor.

8 THE COURT: But there is a potential for adding what
9 language?

10 MR. BRATT: Potential for harm.

11 THE COURT: Potential for harm. And so how would that
12 fit into the three elements?

13 MR. BRATT: So it would be -- it really fits into -- to
14 all of them. It fits into the charge writ large. And it would
15 be something else that the jury would be asked to find, that
16 whether or not --

17 THE COURT: But that the -- that the release of the
18 documents would cause potential harm or that you knew that
19 release of the documents could cause potential harm?

20 How exactly is it formulated?

21 MR. BRATT: The former, that the documents -- the
22 unauthorized -- the mishandling of the documents has the
23 potential for harm.

24 THE COURT: And in this case, it would be the
25 retention?

1 MR. BRATT: Well, retention is the crime. But the
2 consequences of the retention has the potential for harm.

3 THE COURT: Okay. All right. Anything further,
4 Mr. Bratt, on the vagueness?

5 MR. BRATT: I don't think so. I think Mr. Harbach will
6 respond to some of the points that Mr. Bove made about the
7 Presidential Records Act and the Judicial Watch and Clinton
8 situation.

9 I would say, Your Honor, that we do not concede that
10 there was classified information in The Clinton Tapes. And I
11 actually think it's not a good example to point to the book,
12 because those books, like any other former official's books,
13 will go through a classification review. So if there were
14 classified that was in the Taylor Branch book, it would have
15 been taken out.

16 THE COURT: What about in the case of Former President
17 Reagan? I think there is no dispute that his materials
18 contained classified information.

19 MR. BRATT: That's correct. Yes.

20 THE COURT: And -- and his conduct would have been post
21 enactment of the PRA?

22 MR. BRATT: He was the first president who was subject
23 to the PRA.

24 THE COURT: Okay. All right.

25 Okay. Then let me hear any rebuttal from Mr. Bove, and

1 then we will, as usual, break for lunch around 12:00 or 12:15,
2 and then resume with Motion Number 2.

3 MR. BOVE: Thank you, Judge.

4 There is just a few discrete points that I would like
5 to make in response. One relates to the Entitlement Clause.
6 It seemed that -- that the position from the government was
7 that you can ignore that on these facts because they allege
8 that President Trump did not timely return the documents. And
9 I think that flips the standard on its head because the
10 question is fair notice in arbitrary enforcement and what it
11 looks like to someone in President Trump's situation on a
12 prospective basis when you look at the terms of the statute,
13 what's required.

14 And so to say that, after the fact, he never returned
15 them, so the Court doesn't have to analyze "entitled to
16 receive" in our vagueness challenge, that doesn't work.

17 With respect to the Authorization Clause, it -- the
18 discussions seem to turn on: If there is a clearance, then
19 authorized; if no clearance, not authorized.

20 That, of course, is -- is inconsistent with President
21 Trump's statement in the indictment regarding Brennan, where he
22 speaks to a long-term practice of former officials being
23 permitted to have access to classified information. So that's
24 one source of ambiguity.

25 And another relates to one of the witnesses that I

1 referenced when I was up here earlier, and the fact that prior
2 to President Trump's taking office as a candidate, he was
3 treated as if he had a clearance and had authorization and
4 everything that's required by the Executive Order to have
5 access to classified information.

6 And so, yes, that bears on his intent if we were ever
7 to get to a trial, but it also bears on -- what could
8 authorization mean if -- if an incoming president is still
9 being offered access to classified information without a
10 clearance?

11 THE COURT: And is that what you allege was going on
12 here?

13 MR. BOVE: That's what the -- the government's witness
14 makes clear happened here, that the -- that President Trump
15 received briefings as a candidate at Trump Tower.

16 THE COURT: What about after the presidency ended?

17 MR. BOVE: We have -- we have -- I'm not aware of
18 briefings. But what I am pointing to in the post-presidential
19 period is the statement in the indictment that President Trump
20 believes and understands that there is a long-standing practice
21 of former officials having access to classified information.

22 So all of these things, sort of -- I call into question
23 the scope of the term "authorization" under the statute; and, I
24 think, strongly support our position that it can't be limited
25 to the Executive Order.

1 THE COURT: You would agree, of course, that declaring
2 a statute unconstitutionally vague is a quite extraordinary
3 step, and that before you do that, you would -- you would have
4 to and be obliged to consider the judicial glosses one by one.
5 So why wouldn't that just be the appropriate course to do in
6 this case?

7 MR. BOVE: Well, Judge, that's not what Davis says.
8 Davis says that if Congress didn't get it right, the Court's
9 job is to strike the statute. I certainly respect that this
10 would be a significant motion to grant in the history of the
11 case law on these issues. Most, if not all of that case law,
12 predates the retrenchment that we've talked about in Davis. So
13 I understand that it's significant, but it's warranted here.

14 And unlike -- many of these cases, when we talk about
15 Schulte in SDNY, there -- that judge is bound by a
16 2nd Circuit's holding in Heine. When we talk about all of the
17 EDVA cases, Rosen and the following, they are bound by that
18 chain of authority I discussed from the 4th Circuit.

19 At most -- and I heard what Your Honor said about
20 Campa. At most, there is 11th Circuit law about the
21 closely-held component of the NDI Clause. There is nothing
22 else in this circuit, and the Court must balance that against
23 the language in Davis, emphasizing the separation of powers
24 issue and also emphasizing the fact that constitutional
25 avoidance, to the extent it's going to come up, can't be used

1 to broaden a statute. It can be -- that would be
2 inconsistent --

3 THE COURT: Their point is that you don't even have to
4 get to the arguably standardless (dd) because you just look at
5 the waiver, which speaks directly to the presidency.

6 MR. BOVE: Thank you. That was one of the points that
7 I wanted to cover.

8 If the Executive Order -- if the Court is going to
9 treat that as another clause -- and we have discussed that, you
10 understand our position -- and that analysis would have to
11 start at 4.1, the general requirement about -- about
12 restrictions on access. So there is three of those. Favorable
13 determination of eligibility; that happened here, that's why
14 President Trump has the documents. The person signed an
15 approved nondisclosure agreement.

16 The government hasn't disclosed a single NDA signed by
17 President Trump. That never happened because --

18 THE COURT: Well, I think they just explained that,
19 that no such NDA would exist in the case of an executive.

20 MR. BOVE: I think I -- I understood what was said was
21 that the clearance records would not exist, not that an NDA
22 would not exist. But to the extent there is a distinction,
23 either way, they -- the government itself did not abide by the
24 Executive Order with respect to President Trump.

25 And so I'm still talking about 4.1 here. The third

1 part, I think, is --

2 THE COURT: Wait. What's the lack of compliance with
3 the Executive Order?

4 MR. BOVE: That access was granted to President Trump.

5 THE COURT: And that happened just simply by virtue of
6 the position, without any formal documentation?

7 MR. BOVE: As far as I understand it, yes, none has
8 been disclosed.

9 THE COURT: Okay.

10 MR. BOVE: And that is inconsistent with 4.1(a)(2).

11 So the -- the -- in terms of what went on here and what
12 President Trump is on notice of, what he is on notice of is
13 that the government doesn't really mean what it says in 4.1.

14 But in 4.1, the third prong is "need to know." And I
15 think the government didn't discuss the definition of "need to
16 know" in any great detail, which is that Section 6.1(dd). And
17 I just want to make a brief point about that.

18 That definition requires consideration of whether the
19 recipient -- I'm quoting -- "requires access to specific
20 classified information in order to perform or assist in a
21 lawful and authorized government function."

22 And in terms of what type of notice in any narrowing
23 that that definition adds to the statute, what we have here is
24 completely circular logic. The definition uses the word
25 "authorized." It's the same word. All that's happened here is

1 the government -- the prosecutors here are telling Your Honor
2 that they should get to just decide internally
3 what "authorized" --

4 THE COURT: But isn't it just, okay, you no longer are
5 serving in a government function, so you don't have a need to
6 know?

7 MR. BOVE: No, Your Honor. And that's refuted by the
8 indictment itself, the allegation they chose to include where
9 President Trump recites the long-standing practice of former
10 government officials having access to classified information.
11 So the -- and not just presidents. Mr. Brennan is the -- is
12 who he is talking about there. And so this 4 point -- the
13 other section relating to former presidents is not the only way
14 in which this Executive Order applies.

15 Our point is that this definition simply incorporates
16 the same word, "authorized," and just says: Don't worry.
17 We'll decide it at DOJ.

18 That is not consistent with the vagueness doctrine.
19 It's absolutely inconsistent with Davis.

20 The next point that I wanted to make is that the other,
21 sort of, actual notice argument that the government presented
22 here this morning is that President Trump was aware of the
23 situation with Former Secretary of State Hillary Clinton. How
24 did that bear on his actual notice? She wasn't prosecuted. So
25 to the extent that that informed his view of how 793 applies --

1 and we've discussed this at length in our selective prosecution
2 motion -- it only bears favorably on this motion.

3 THE COURT: Well, I think they're saying that, if
4 anything, that just goes to willfulness, and it really
5 wouldn't -- would not factor into the vagueness component.

6 MR. BOVE: Then -- and I don't understand how that
7 could be the case. If these are part of the sequence of events
8 leading up to his understanding of the statute, whether he is
9 on fair notice with respect to the application of the statute,
10 is that DOJ historically has not applied it in this way, then
11 that -- that is relevant to: Was he on fair notice? And
12 whether in this case, this case here today (indicating), the
13 DOJ is applying that in an arbitrary fashion.

14 THE COURT: On the -- just the 793(e) cases, document
15 alone, no transmittal, what are the most helpful cases?
16 Because a lot of the cases describe the other components of the
17 Espionage Act, and there is a lot of reliance on elements
18 that don't factor into this charge.

19 MR. BOVE: I think that every case -- so Gorin, Heine,
20 Morison, every case that, in order to resolve a vagueness
21 challenge, speaks to not only willfulness but also the injury
22 requirement that we've been talking about are favorable to us,
23 because they demonstrate that the text of the statute alone in
24 a documents case is not enough to pass constitutional muster on
25 a vagueness theory.

1 Every one of those cases, where the Court needed to
2 resort to that extra step -- I think it's been conceded,
3 Morison in that way is an outlier. That's the 4th Circuit,
4 from our view, saying there is not enough here on its face; we
5 are going to add this to clean this up.

6 And I think that that is something that if a court was
7 inclined to -- to view all of these glosses in order to save
8 this thing and make it applicable in this case -- and we don't
9 think that's possible, but if there is any hope of that, it
10 would be to require the -- the injury and potential harm
11 aspects that have been applied in other cases.

12 THE COURT: So is that your position, that that should
13 be added? And, if so, how would you add it?

14 MR. BOVE: No. Our position is that this must be
15 struck under Davis in the way that the Court most recently
16 imposed all of the judicial glosses we are talking about, has
17 discussed vagueness analysis, which is that Article III courts
18 cannot rewrite statutes to save them.

19 My point is --

20 THE COURT: Well, there is a pattern of doing that to
21 some extent in the Espionage Act, and I think the question that
22 you have raised is whether the combination of the features
23 under the current circumstances warrants a deviation from that
24 practice of using judicial glosses.

25 MR. BOVE: Well -- well, I think that we have also

1 raised a threshold question, which is whether the judicial
2 gloss practice is viable post-Davis, and I think that Davis is
3 pretty clear that it's not. Davis says a vague law is not a
4 law at all. It is void on the day it is passed. No gloss
5 saves that.

6 THE COURT: I don't know if that's a fair understanding
7 that Davis establishes a categorical rule of forever
8 prohibiting courts from adding necessary language to save a
9 statute from an otherwise unconstitutional presentation.

10 MR. BOVE: I'm quoting from page 2323. "The role of
11 courts under our constitution is not to fashion a new, clearer
12 law to take its place, but to treat the law as a nullity and
13 invite Congress to try again."

14 So I -- respectfully, I think that is the message of
15 Davis. And I do not think that pre-Davis judicial loss cases,
16 especially when they're based on Gorin, which relates to a
17 different statute and apply the injury prong, can be
18 incorporated in this circuit --

19 THE COURT: But you still have the canon of
20 constitutional avoidance. I mean, it can't be that Davis just
21 eliminates the possibility to make reasonable interpretations.

22 MR. BOVE: But this -- this line of cases that I'm
23 talking about, all three of them address this constitutional
24 avoidance concept and the potential for tension with the rule
25 of lenity. In the Skilling case that Mr. Bratt brought up, the

1 Court narrowed the statute to bring it within constitutional
2 limits.

3 What we're talking about here is a one-of-a-kind,
4 first-ever prosecution. They're not asking you to narrow
5 anything. They're asking you to look at dictionary definitions
6 that don't say what they're telling you they say, and define
7 the statute so it fits this case. And under Davis, our
8 position is that that -- that doesn't survive.

9 I would like to make one point about Count 19 and then
10 I'm done, except to the extent the Court has a question.

11 Mr. Bratt's responses about, you know, factually what
12 happened there, and are there any documents related to this,
13 they tie right into the pending prosecution team motion.
14 Because the only reason that he can stand up here and say, I'm
15 not sure, maybe they will read the news about the argument and
16 send me some things, is that they have declined their
17 obligation under the Justice Manual and all the cases that
18 we've cited to treat the Energy Department and the other cases
19 cited in the indictment as part of the prosecution team, and do
20 the case file search that the Justice Manual requires.

21 And they've now said in their briefing multiple times,
22 I think, we are complying with the Justice Manual; that is not
23 true. And it allows them to stand at a podium like this and
24 say, gee, Judge, I'm not sure, but maybe they will send me the
25 inculpatory information. And that can't stand.

1 THE COURT: Okay. All right. Thank you. It is 12:00.
2 We will be recessing for one hour and 15 minutes, and then we
3 will resume argument on the other motion set for today.

4 Thank you. Enjoy your lunch.

5 (A recess was taken from 12:05 p.m. to 1:19 p.m.)

6 THE COURT: All right. Please be seated. Good
7 afternoon.

8 We are back in session. This is Case Number 23-80101.
9 I will now hear argument on the motion docketed at 327, which
10 is a motion to dismiss based on the Presidential Records Act.
11 This is filed by the former president.

12 Let me just circle back with Mr. Irving. Were you able
13 to determine whether you joined in this motion?

14 MR. IRVING: Yes, Your Honor. And I apologize for my
15 earlier confusion. Yes, we did, and that is set forth in
16 docket number 331.

17 THE COURT: Okay.

18 MR. IRVING: We did not join the vagueness motion,
19 number 325.

20 THE COURT: All right. You need to speak with a
21 microphone because you're not getting picked up.

22 MR. IRVING: Apologies, Your Honor.

23 So just to restate, for the record, apologies for my
24 earlier confusion. We said in docket number 331 that we did
25 not join in the vagueness motion, 325, because Mr. De Oliveira

1 is not charged in any of the Counts 1 through 32, the charge
2 793(e), but we did join 327, the PRA motion, which is about to
3 be argued now.

4 THE COURT: Do you wish to present argument on that
5 motion today?

6 MR. IRVING: I do not.

7 THE COURT: Okay.

8 MR. IRVING: Thank you.

9 THE COURT: All right. Well, then, who will be taking
10 the lead on this motion?

11 MR. BLANCHE: Good afternoon, Your Honor. So we're
12 jumping around and maybe going to repeat ourselves a little bit
13 from this morning's arguments because there is certainly some
14 overlap. But to start, it's important to understand why the
15 PRA is relevant to a pretrial motion to dismiss.

16 The statute that President Trump is charged requires
17 that -- that there be an unauthorized retention. If the
18 Presidential Records Act authorizes President Trump to retain
19 the records, then it's fatal and the indictment can be
20 dismissed.

21 The Court asked early on this morning about whether
22 there were any fact development that was necessary for
23 the -- the vagueness, for the reasons that we said earlier,
24 that there is not any -- for that motion, similarly for this
25 one, there is not either.

1 THE COURT: But how can that be right? Your position
2 depends upon a conclusion that there was, in fact, a
3 designation of the records as personal. And that is not
4 alleged in the indictment. So it would necessarily require or
5 resort to materials outside the indictment.

6 MR. BLANCHE: Judge, not materials. Law outside of the
7 indictment. And there is nothing wrong with the Court looking
8 at law outside of the indictment. An easy example is the
9 context of, for example, a 922(g), felon in possession charge.
10 On a -- on a charge to dismiss the indictment in that case, the
11 Court does and often will look to, for example, state law and
12 whether -- and whether the indictment, as a matter of law,
13 fails because of state law. And so he --

14 THE COURT: But this is not just a matter of
15 referencing law. It's drawing a conclusion, applying that law
16 to the factual designations and documents here. It's not
17 merely a -- a legal analysis in the abstract.

18 MR. BLANCHE: It's not just applying -- it's not just
19 applying the law, of which there is plenty, upon President
20 Trump's side. It's also looking at the face of the statute.
21 The indictment and -- and the Special Counsel's opposition
22 brief just state as a matter of fact that the materials at
23 Mar-a-Lago were presidential records.

24 THE COURT: And there is a dispute about that. So
25 wouldn't that -- wouldn't that be something to raise in the

1 form of a trial defense and not in the form of a motion to
2 dismiss the indictment?

3 MR. BLANCHE: We do not believe there is a dispute
4 about that. I mean, we believe that the law is -- is crystal
5 clear, going back from when the law was passed in -- in the
6 '70s. I mean, if you step back for a moment, presidents since
7 George Washington, right, have taken materials out of the
8 White House, and -- and it was solely their discretion with
9 what they chose, what a U.S. president or vice president chose
10 to take out of the White House, when they left office.

11 The Presidential Records Act, passed in the late '70s,
12 didn't touch that except to say -- except to say that a
13 president, during his administration, during his administration
14 could keep records as he saw fit. And those records, which he
15 determined were presidential records, should be delivered to
16 the Archives and to NARA and the other records should not.
17 Period. They're personal.

18 So there is no -- there is nothing in the text of the
19 statute that makes exceptions, like the Special Counsel wants,
20 for documents that are affixed with any kind of classified
21 markings. There is nothing in the statute that gives any power
22 to the National Archives to question a president's
23 determination of whether a particular document is personal or
24 presidential.

25 And there is case law -- I mean, if you think about the

1 case law that talks about Congressional reasons for this,
2 Congress knew -- Congress knew about the classification,
3 Congress knew about the executive orders when they passed this
4 law, and they passed the law silent on that.

5 And I think it's instructive when you think about what
6 the Court said in Judicial Watch, which was that they're --
7 that Congress really wanted to limit the scope of any review,
8 and that there is very little oversight authority for the
9 president and vice president's document preservation decisions.
10 So --

11 THE COURT: All of that might be right. But, again,
12 why does it warrant dismissal of this 793(e) indictment?
13 Doesn't your position necessarily require me to conclude that
14 the PRA implicitly repealed the Espionage Act, at least as
15 applied in this context?

16 MR. BLANCHE: Absolutely not. It doesn't require a
17 repeal. The Espionage Act talks about unauthorized. And the
18 bottom line is -- and this is from paragraph 4 of the
19 indictment -- President Trump caused boxes to be transported to
20 Mar-a-Lago when he was still president. This isn't after the
21 fact. It's not a former president making a decision about --
22 about what to do with records or what to do with documents.

23 He had original classification authority. He had the
24 authority to do whatever he thought appropriate with his
25 records. He was still president when he made that decision,

1 and as such, they are presidential records. It doesn't require
2 anything outside of the indictment or the case law.

3 I mean -- and by the way, that's the way that NARA has
4 handled every single presidency since the PRA was passed.
5 We're not asking the Court to do anything to -- to stretch the
6 rules or stretch the law.

7 The only time, the only time that the government is
8 taking a different position with respect to presidential
9 records being presidential or personal -- I'm sorry, records
10 being presidential or personal, is with President Trump.
11 Period.

12 If you think about the Judicial Watch case, which
13 involved Clinton's socks, President Clinton didn't even have to
14 go to court in that case. I mean, so -- so think about that.
15 There is a lawsuit that says, hey --

16 THE COURT: Well, he wasn't a named party.

17 MR. BLANCHE: Correct. Because NARA, NARA, the
18 government, the government stood up and said there is no
19 way -- there is no way that we, NARA, should ever ask that --
20 then President Clinton about what he decided in his -- in his
21 own -- his own decision-making as president were personal
22 records.

23 And, you know, again, it's instructive -- and this is
24 in our brief, but it's instructive to say to the Court now,
25 when considering -- when NARA was thinking about, well, how

1 could we possibly get these tapes back, the idea came up with
2 how they would seize them.

3 And the defendant said -- and I'm citing from the --
4 302 and 303 of Judicial Watch -- that the seizure would be an
5 extraordinary request, unfounded, contrary to the PRA's express
6 terms and contrary to traditional principles of administrative
7 law. And that's 845 F.Supp 2d 302-03.

8 And if you think about that position that NARA took
9 then, the idea that we would have any thought to go and seize
10 President Clinton's tapes, and why did they think there was no
11 basis to it? Because President Clinton, while president,
12 didn't send -- send them to the National Archives. So by
13 definition, he must have sent them to his house because he
14 deemed them personal. Congress -- that's the way Congress
15 wants it. And so what happened here --

16 THE COURT: Again, all that might be right, and I think
17 you have some -- some -- some forceful arguments referencing
18 Judicial Watch. But, again, I'm not seeing how any of that
19 leads to dismissal of the indictment. Perhaps it features in
20 the form of a defense and arguments about authority or lack of
21 authority and unfettered discretion in the context of
22 willfulness and -- and perhaps the unauthorized element and the
23 jury instructions on that point. But to get the relief you're
24 seeking now on this motion, it seems like it would essentially
25 require a ruling, as I said, that -- that the PRA, as applied

1 to this case, eliminates -- eliminates the Espionage Act
2 possibility altogether and, therefore, requires dismissal. And
3 that's where I think your position ultimately falters.

4 MR. BLANCHE: Well, when you -- when the Court talks
5 about whether we are eliminating another statute, remember that
6 when the PRA was passed some 30-plus years after -- after the
7 National Defense Act, Congress was well aware of the rules and
8 the statute that existed with respect to the NDA and the
9 president and the vice president's exclusion from that, while
10 president, passed the Presidential Records Act, said nothing
11 about -- said nothing about classified documents or the
12 executive orders which have been in existence also for decades,
13 and passed the law that made plain exactly what the president
14 in his authority could do with respect to -- to records that he
15 accumulated during the White House. And, made plain, they
16 either go to NARA -- and if they're not presidential records,
17 that means they're either copies of records, potentially
18 administrative records, or they're personal records. There is
19 no discretionary function.

20 So it isn't -- it is proper for a motion to dismiss,
21 Your Honor, because -- because the -- to prove Counts 1
22 through 32, the government has to prove that the possession was
23 unauthorized. There is no basis in law for that. There is
24 simply no basis in law. The opposition brief just states as a
25 matter of fact.

1 THE COURT: Well, they say there is a basis in law
2 because the statute says unauthorized. And you can -- you can
3 borrow from the Executive Order, and you can borrow from
4 dictionary definitions, and that's that. You don't need to
5 resort to the Presidential Records Act at all, because we're
6 just focused on the elements of the criminal charge.

7 MR. BLANCHE: That's exactly what they say, because if
8 they were to say, Judge, let's focus on the Presidential
9 Records Act, and the case law, and NARA's position since its
10 passage about what constitutes personal records and, thus,
11 lawfully -- lawfully unauthorized to obtain and to keep, if
12 they engaged in that discussion with the Court, then the
13 indictment is dismissed. And --

14 THE COURT: Your arguments might have some -- some
15 force, perhaps in the context of, like I said, a trial defense
16 or maybe any other motions that you have raised, but, again,
17 it's difficult to see how this gets you to a dismissal of the
18 indictment.

19 What case law can you -- can you offer that would
20 support the notion that there is really this inherent
21 incompatibility between the PRA and in a 793(e) charge as
22 against a former president?

23 MR. BLANCHE: Well, when there is -- when there is
24 tension, which there certainly is here, because the PRA doesn't
25 mention anything having to do with any documents that would be

1 potentially classified under the National Defense Act, it -- it
2 is -- what the -- what the Court should do is look to what the
3 agency has done and what the Department of Justice has done for
4 the -- since its passage. And that's instructive.

5 You know, we put in our brief the -- plenty of case law
6 that talks about the absence, the absence of precedent is
7 instructive to the Court. And that's very applicable here.

8 If you think about going back to the first president
9 that -- that was bound by the PRA, President Reagan, I mean,
10 you have a situation that directly -- directly clashes with the
11 PRA and the National Defense Act. He had classified
12 information in his diaries. No dispute.

13 I really don't think there is a dispute about the
14 Clinton socks tape case either. But certainly, with President
15 Reagan, there is no dispute. So when the Court asks for any
16 kind of precedent, let's look at that case.

17 NARA never even considered -- considered saying, well,
18 there might be personal records, but we have this National
19 Defense Act, and so we are going to either -- even investigate,
20 putting aside charge -- even investigate Former President
21 Reagan for possession of -- of something that should be a
22 violation of the Espionage Act. That's instructive. That's
23 very instructive.

24 You can also take what Mr. Bratt and what Your -- what
25 Your Honor asked --

1 THE COURT: It's -- it might be instructive, but is it
2 worthy of dismissing an indictment?

3 MR. BLANCHE: Absolutely.

4 THE COURT: Well, why exactly? That's the --

5 MR. BLANCHE: Sorry.

6 THE COURT: It's okay.

7 MR. BLANCHE: And you're right. This also -- we're
8 bleeding into vindictive and selective prosecution here, in a
9 place that maybe the same arguments are going to apply with
10 equal force. But -- but even short of selective and vindictive
11 prosecution, it is helpful to look at what NARA -- what NARA
12 did here. And you asked the government whether this crime was
13 completed the day after President Trump left office.
14 It -- it -- in their -- in their view, it was. And when you
15 consider the fact that not only has the Department of Justice
16 never even opened a criminal investigation prior
17 to President -- or this -- the one against President Trump, and
18 now they have opened two more and closed them both -- but they
19 could have charged -- I mean, if you -- if you accept what
20 they're saying as true, that the Espionage Act trumps that the
21 materials were absolutely not personal, just by definition,
22 then why did they wait until last summer to indict?

23 And Mr. Bratt, you know, prosecutors have discretion
24 and all of that, and sure, there is a place for that at times.
25 But the reason why is -- in our view, aside from the fact that

1 it was completely politically motivated, and that goes to
2 another motion that we have pending before Your Honor -- is
3 because there is no precedent for doing what -- doing what they
4 did here.

5 And it's -- it's challenging to say, well,
6 President Trump, you have to go to trial, or maybe there is
7 another place where you can raise this defense -- when the
8 Department of Justice itself has taken the position repeatedly
9 that discretion -- that discretion around records lies with the
10 President of the United States.

11 It doesn't lie with the Special Counsel. The Special
12 Counsel should not have been authorized to just announce to
13 themselves and announce to a magistrate judge: They're
14 presidential records. We're going to get them.

15 Because under the PRA, under the PRA, by
16 President Trump not transferring records to NARA, to the
17 National Archives, they are personal. And, you know,
18 it's -- it's -- you continue to see the process of Congress
19 being played out with what President Trump did.

20 The reason why Congress put all that discretion into
21 the president is because the hope was that a president, even
22 after leaving office, would donate and send even materials he's
23 marked as personal back to the Archives, which is exactly what
24 we saw happen here when several boxes were transferred back to
25 the Archives. And I -- I --

1 THE COURT: Well, wouldn't your position -- I mean, the
2 Special Counsel cites case law that -- essentially, the
3 position you're taking with respect to this unreviewable
4 personal designation -- would effectively gut the PRA
5 altogether, and it would just -- it would just permit
6 unfettered classification of, clearly, presidential records as
7 personal without any possibility for judicial review. And then
8 there is some indication in the cases cited that, at least with
9 respect to the review of guidelines, that that sort of question
10 is reviewable.

11 MR. BLANCHE: Well, with respect to the -- the cases
12 that have to do with reviewing guidelines and maybe the FOIA
13 application of PRA, or whether a document that's presidential
14 is really an agency document, there is a whole different body
15 of administrative law that allows that to be reviewed by the
16 Court; but the Presidential Records Act doesn't.

17 And when you say, well, what's my answer to that?
18 Congress has the ability to change the law. I mean, there is a
19 pending bill in Congress right now that was -- was offered last
20 March, March of 2023, to make changes to the PRA. And -- and
21 that's pending. And that's what -- that's what's supposed to
22 happen. It's not supposed to be that the Department of Justice
23 can just announce that, notwithstanding what the statute says,
24 that they could investigate because in their inherent -- I
25 mean, think about this, Your Honor. The cases talk about the

1 limited judicial review, if any -- but we will say limited --
2 of whether a record is personal or presidential. Think
3 about -- let's assume that that's true for a moment. Here,
4 it's -- the Court isn't even getting the opportunity to review.
5 The Department of Justice, again, for the first time ever, has
6 decided: We don't even need the Court to review this. We're
7 going to decide on our own that the records that President
8 Trump took from the White House while authorized and while
9 president are presidential records and not personal.

10 There is no case law that supports that, and there is a
11 lot of -- well, not a lot -- there's case law that cuts against
12 that. And it does matter the way that other
13 presidents have --

14 THE COURT: But I think their argument is also, that
15 even if you -- you conceived of these records as personal, it
16 still wouldn't -- it still wouldn't brush aside the 793(e)
17 charge which does not hinge or depend upon that particular
18 designation.

19 MR. BLANCHE: Well, there might be some tension. But
20 my colleague raised it this morning, and it's cited in our
21 papers, that's -- that's the way NARA has handled this. NARA
22 has handled -- has handled the interplay between personal
23 material, personal material from the presidency, and
24 potentially classified material like The Clinton Tapes, like
25 The Reagan Diaries -- basically was saying, hey, former

1 president, can you take a look and please return them?

2 That's -- and that's -- I'm not -- that's exactly what
3 The -- The New York Times editorial talks about. And it's
4 not -- and it's not -- and the answer back, by the way, from --
5 from President Bush -- I have a copy if Your Honor would like a
6 copy of it.

7 THE COURT: Of which case?

8 MR. BLANCHE: This is -- it's not a case. It's The
9 New York Times.

10 THE COURT: Oh, okay.

11 MR. BLANCHE: I can give it to the Court if you'd like.

12 THE COURT: Okay.

13 MR. BLANCHE: But it's -- (tendering document.)

14 It completely confirms and makes plain our entire
15 argument, our entire argument being, look --

16 THE COURT: Just one moment.

17 Just for the record, this is a January 27, 2023,
18 New York Times article, entitled: "As Archives Leans on
19 Ex-Presidents, Its Only Weapon Is 'Please.'"

20 All right. Please continue.

21 MR. BLANCHE: And yes, thank you.

22 And so what we're saying to the Court and what we said
23 in our motion is NARA has no authority to question or
24 investigate personal records from a former president of the
25 United States. What NARA said, as relates to every single

1 president except for President Trump, is -- very much agrees
2 with us. They said exactly the same thing. They sent a letter
3 out to all of the ex-president's libraries and asked them to
4 look at their personal records to see if maybe there was
5 anything that classified.

6 There is no -- they didn't call Mr. Bratt. They
7 didn't -- they did no criminal referral. And, by the way,
8 President Bush, a spokesman for President Bush just basically
9 replied back and said, okay, we're sure we're fine.

10 And so -- and so, by the way, and this is in our reply
11 papers -- the current administration very much agrees with us
12 as well. So in the course of the Hur investigation --

13 THE COURT: Right, right. But that argument doesn't
14 seem to have gone over that well as far as the Hur Report.

15 MR. BLANCHE: Well, Vice President Biden -- I'm sorry.
16 President Biden wasn't charged. So we don't know what would
17 have happened with that argument had he been charged. But Hur
18 was not -- didn't accept it in determining that no charge would
19 be brought anyway.

20 But, again, Your Honor is asking President Trump to
21 give you a reason why, short of trial or short some other
22 proceeding, the Court can grant this motion, given its -- we're
23 at the motion to dismiss stage. All those factors are -- are
24 something the Court should take into consideration.

25 We don't have a lot of case law, because as Mr. Bratt

1 conceded this morning, this has never happened before. NARA
2 has never given a criminal referral to the Department of
3 Justice under any circumstances similar to this.

4 And, by the way, I should say -- Your Honor asked
5 whether the criminal referral was -- whether President Trump
6 was told about that. He was not. At some point very close to
7 indictment, I believe, he received a -- a target letter, but he
8 was not informed at the time. A year and a half later, he was
9 informed.

10 So we're -- we're counting up the ways. And this is
11 maybe not as much of a legal argument as we had this morning,
12 for better or for worse. But the reason why it's not is
13 because you have a couple of cases involving former presidents,
14 Reagan and Clinton. And you have NARA and the Department of
15 Justice taking a very firm position that they can have no role,
16 that is, no say in what constitutes a personal record.

17 THE COURT: What about the American Historical
18 Association case?

19 MR. BLANCHE: Well, I mean, that case is -- is slightly
20 different but dealt with -- with different facts than whether a
21 personal record of a president could be reviewed by -- in the
22 context of whether it had to be produced and reviewed. That
23 was -- that was having to do with something slightly different.

24 And, look, that's why we say limited review, and I
25 think that's the same thing that Judicial Watch speaks to as

1 well.

2 THE COURT: So what is the limited review that you
3 think is allowable?

4 MR. BLANCHE: Nothing that applies here. There
5 is -- within the -- within the -- the PRA, there -- there are
6 different definitions, Mr. Bratt addressed some of them, of a
7 presidential record and then others types of records. There is
8 potentially review about whether a document is actually an
9 agency record, potentially, whether a document is subject to
10 the rules of FOIA that's been marked something different. So
11 there is another -- there is other areas of law where it
12 potentially could apply.

13 But here, the facts are quite simple. While president,
14 President Trump took records to his home, like every president
15 before him. NARA never questioned -- and, matter of fact, not
16 only didn't question, but affirmatively stated in court,
17 repeatedly, that it did not have the authority to question the
18 president's determination of such. And for the first time
19 ever, NARA took a different view and said, no, here we're going
20 to make a criminal -- a criminal referral.

21 THE COURT: All right. NARA, though, isn't the entity
22 initiating the charges. They made the referral. And
23 then -- and then -- and then the Department of Justice pursued
24 charges in the investigation. And so I'm not sure how those
25 cases involving NARA's authority necessarily foreclosed DOJ

1 from bringing a criminal charge with -- at least viewing this
2 under the lens of, is dismissal of an indictment warranted?

3 MR. BLANCHE: Fair with the following caveat, that
4 if -- if the referral was completely wrong and unlawful under
5 the law, then the Court absolutely --

6 THE COURT: But walk me through that argument because
7 I'm not sure -- but what exactly is your argument? That
8 because NARA had never done this before, it creates an
9 impermissible taint in the original referral, but then just
10 shuts everything else down? What exactly is the argument?

11 MR. BLANCHE: No. No. Our argument is not that simply
12 because they had never done it before, it tainted it. Nor is
13 our argument that NARA could never refer anything to the
14 Department of Justice. The examples cited last night in the
15 response by the Special Counsel, if somebody is, you know,
16 caught using drugs in NARA or there is a fight in NARA, that
17 that's -- that's completely separate from what we're talking
18 about.

19 It's not about whether NARA had ever done it before.
20 It's about that NARA knew at the time, based upon a whole body
21 of law and the statute itself, that they had no authority to
22 question President Trump's determination that the records were
23 personal.

24 So the fact that they had not done it before is not
25 surprising because they're not allowed to, but that isn't where

1 the argument should end. It should also be that they knew,
2 NARA knew, we're not allowed to question this, President Trump
3 took it while he was president?

4 And then in those circumstances, the -- the referral is
5 invalid that, the likes of which, that also case law suggests
6 you can dismiss in those circumstances.

7 THE COURT: Which case would be most appropriate?

8 MR. BLANCHE: So there is the -- the cases that are
9 cited involving, for example, SORNA -- the SORNA laws where
10 afterwards there is a determination that the underlying agency
11 determination -- interagency determination about -- a decision
12 about suggesting a charge or referring was so flawed and so --

13 THE COURT: But aren't those -- aren't those cases
14 predicated upon -- like, the indictment -- the indictment
15 itself in those cases was rooted in the agency rule, which is
16 not what we have here?

17 MR. BLANCHE: I very much agree that it's not, that
18 there is a slightly nuanced difference. But the principle
19 remains exactly the same. So NARA knows we cannot refer this
20 to the Department of Justice because President Trump -- we
21 don't have the authority to question President Trump's
22 determination of personal versus presidential. And then they
23 refer it anyway, sure.

24 THE COURT: But is that what they're referring? In
25 other words, I think what the Special Counsel has said,

1 pointing to the Inspector General Act, which is that this
2 agency, just like any other agency's IG, can refer suspected
3 violations of criminal law to the Department of Justice.

4 So why wouldn't it just be that; they're
5 referring -- referring under that standard IG power, at which
6 point then, the Department of Justice takes the lead and
7 moves -- moves forward, assessing whether any criminal laws are
8 implicated?

9 MR. BLANCHE: Well, I mean, built into the hypo,
10 Your Honor, was something that's -- that isn't true in this
11 case, which is that they had -- under our argument, that they
12 had a suspicion there was a violation of federal law. That's
13 not -- NARA didn't have that suspicion. That's why we're
14 saying it's a sham referral. Because NARA had occasion over
15 the years to deal with presidential records -- excuse me --
16 with records that were personal that contained classified
17 information, and took the position, very strongly, that there
18 was nothing that could be done about that, certainly not a
19 seizure, as was discussed in Judicial Watch.

20 THE COURT: Well, certainly, I think you're correct
21 that the notion of a personal seizure from a former president,
22 at that time at least as characterized, was deemed to be an
23 extraordinary act, that, I think, is borne out in the opinion
24 and in the oral argument.

25 So, okay.

1 MR. BLANCHE: So --

2 THE COURT: But aren't there other decisions, American
3 Historical Association and then Armstrong, too, that seem to
4 cut back a bit on Judicial Watch's more broad view that that --
5 that classification determination is unreviewable?

6 MR. BLANCHE: There are. I very much agree with that,
7 that they suggest and they cut back. But -- but "Armstrong I"
8 and Judicial Watch and CREW, their reasoning and -- as applied
9 to President Trump and what we have here, so not talking about
10 whether there is a discussion between the president and NARA
11 about what -- how to designate the records or not -- talking
12 about whether a particular record is an agency record as
13 opposed to a personal record, those cases, they do suggest a
14 different analysis by the Court, but we don't have
15 those -- those facts.

16 When you compare our facts, which is President Trump
17 making a decision to take records with him as personal,
18 you -- the only -- I mean, the -- the only law that exists says
19 that NARA has no right to -- to question that.

20 And I appreciate what Your Honor is saying, that there
21 may be a better forum, notably a selective prosecution and
22 vindictive prosecution, where this becomes very relevant to the
23 Court's decision with what to do with this case. And we agree
24 with that. But it still -- it's still a perfectly appropriate
25 basis for a motion to dismiss, and here is why -- and here is

1 why.

2 President Trump -- everybody knew about the Clinton
3 socks case. Folks knew about what had happened with even
4 nonexecutives, vice presidents or presidents, the
5 secretary -- Secretary Clinton, President Reagan, and that -- a
6 lot of press, a lot of litigation around those cases.

7 And the decision is unequivocal that unless you're
8 President Trump -- unless you're President Trump, NARA is not
9 going to -- not only -- not only going to refer, but disclaim
10 any responsibility for even doing anything but asking you to
11 take a look. And so we're leaking back into a different --

12 THE COURT: Are you reaching a little bit, though? I
13 mean, the Judicial Watch decision reserves ruling on the
14 judicial review question and then ultimately pivots to
15 redressability. In the context of redressability, there is
16 then that necessary discussion about, well, there is no relief
17 that a court can grant because NARA can't intrude in that
18 determination.

19 And so I guess my question is, are you reading more
20 into Judicial Watch than is warranted?

21 MR. BLANCHE: We are leaping a little bit, Judge, yes,
22 because it's, in our view, outrageous what is going on. And
23 I'm not trying to overread Judicial Watch. Its holding is what
24 it is. But the facts of that case -- Mr. Bratt talked about
25 willfulness, for example.

1 President Clinton hid tapes in his socks. And NARA
2 said "nothing we can do about that." And the -- and Mr. Bove
3 talked about this earlier, but the types of communications on
4 those recordings were very similar to a lot of the materials
5 that are at issue in this case, involving world leaders,
6 one-sided communications with world leaders, Afghanistan, the
7 war going on --

8 THE COURT: Do you know if any of the briefing in
9 Judicial Watch or the oral argument or the record filed on the
10 docket would shed light on whether the tapes contained
11 classified information?

12 MR. BLANCHE: I don't, but nobody ever got the tapes.
13 So but for the -- that's the whole point here, is they were
14 personal. And so President Clinton didn't have to do it -- he
15 could keep them in his sock drawer.

16 THE COURT: Okay.

17 MR. BLANCHE: And so I -- we will check the record on
18 that. But I believe there were representations made along the
19 way that they included recordings of one side of a conversation
20 with foreign leaders, obviously, you know, President Clinton.
21 And extensive discussions about the war in Afghanistan. Hard
22 to imagine that talking to a current president of the
23 United States about an ongoing war wouldn't be classified.

24 THE COURT: Do you know if there was any follow-up to
25 the Judicial Watch litigation, any next steps, any -- any

1 provision of tapes or anything like that?

2 MR. BLANCHE: I don't know --

3 THE COURT: Okay.

4 MR. BLANCHE: -- Your Honor. I'm not aware of anything
5 that was done. And, by the way, The Reagan Diaries are of
6 exactly the same sort, confirmed classified information kept by
7 a president.

8 THE COURT: But I think the Special Counsel says, yes,
9 but it was in the form of a diary. And so it's more fair to
10 characterize that, at least in terms of format or initial
11 review, as a personal record, not a presidential, as compared
12 with what is charged here.

13 MR. BLANCHE: Judge, the way this conversation started
14 is how the interplay of the Espionage Act plays with the PRA.
15 The Special Counsel can't say that and say, well, so it's okay
16 that there is Espionage Act violations because it's a diary;
17 we're okay with that. So the statute allows for that, but not
18 under the PRA.

19 I mean, if there is -- if there is a personal record,
20 which President Reagan's diary apparently was, that has
21 classified information, it doesn't make -- there is no logic to
22 how the Special Counsel can say, well, for President Trump,
23 personal records, because there's classified, there is an
24 interplay with -- with the national Espionage Act, so we're
25 allowed to go search, but with President Reagan, it's a diary,

1 so it doesn't matter if there is classified information there.

2 I mean, there is inconsistencies -- they can't have it
3 both ways, right, I guess is at the end of the day the point.
4 They can't say, with respect to the Clinton -- Clinton with
5 Judicial Watch, that it's okay that we never made any effort to
6 investigate -- open a criminal investigation about whether
7 there was national security information in President Clinton's
8 socks. We don't have to do that.

9 And, you know, again, it's worth noting that presidents
10 and vice presidents, including Vice President Biden, are given
11 a lot of autonomy under the PRA to make decisions about how to
12 manage their recordkeeping practices. And that was intentional
13 by Congress, and that was intentional in -- in the lead-up to
14 the PRA, and for every year thereafter, where the PRA has
15 remained completely untouched, even after The Reagan Diaries,
16 even after Judicial Watch, and the Clinton socks, and more
17 recently, like I said, there is a -- a draft bill in front of
18 Congress.

19 THE COURT: Does that draft bill -- this is just for my
20 curiosity -- does that actually purport to amend the PRA or do
21 something else?

22 MR. BLANCHE: I have a -- would you like a copy,
23 Your Honor?

24 THE COURT: No. No. Okay.

25 MR. BLANCHE: Okay. Both. I mean, it -- it's in

1 addition to the -- to the PRA. It's called the Classified
2 Documents Accountability Act. And it just --

3 THE COURT: But it amends the PRA or it just --

4 MR. BLANCHE: I don't know if it would technically
5 amend the PRA, Your Honor.

6 THE COURT: Okay. All right. Then my last question
7 is: In some of the FOIA documents that have been filed in this
8 action and then cited in the amicus brief, there were FOIA
9 assertions under Subsection (b)7, which I understand to be a
10 law enforcement purpose shield.

11 Do you know sort of how it is that NARA would be
12 asserting law enforcement privileges in the FOIA documents?

13 MR. BLANCHE: No. The short answer is that's -- that's
14 not -- I wouldn't -- I don't have any idea how they would or
15 could. Given their past practices before this investigation,
16 that wouldn't ring true to me. But I -- but -- so I don't
17 know, Your Honor.

18 THE COURT: Okay. All right. I don't have anything
19 further for you at the moment.

20 So let me hear from Mr. Harbach.

21 MR. HARBACH: Good afternoon, Your Honor.

22 THE COURT: Good afternoon, Your Honor.

23 MR. HARBACH: It's a little difficult to know where to
24 start, but I will make a suggestion. There are three points
25 that I would like to make up front, and then if there are any

1 of them that Your Honor has follow-ups on, maybe we can -- I
2 will go wherever you would like to lead me.

3 The -- the threshold -- before the three points,
4 there's a threshold observation about what Mr. Trump is asking
5 the Court to do here. It's asking Your Honor to find, as a
6 matter of law, at the Rule 12 stage, that because he took these
7 highly classified, sensitive materials relating to things like
8 nuclear capabilities of foreign countries and American military
9 contingency planning, stuff like that -- that because he took
10 them, they are necessarily personal, and that because they're
11 necessarily personal, he could retain them, he was authorized
12 to retain them, and that, therefore, the indictment must be
13 dismissed. And there are all sorts of reasons that's wrong,
14 and here are the three points.

15 First -- and I think this is worth saying because it's
16 a bit of an elephant in the room today.

17 The documents charged in the indictment are not
18 personal records. Period. They are not. They are nowhere
19 close to that under the definition in the Presidential Records
20 Act. Mr. Bratt read the definition this morning. I'm not
21 going to read it again.

22 More to the point for this Rule 12 proceeding, is that
23 the only possible inference from the allegations in the
24 superseding indictment, the descriptions in the superseding
25 indictment of what these documents are, which must be taken as

1 true at this stage, the only possible inference from those
2 allegations is that they were presidential and not personal.

3 Now, Your Honor questioned my friends on the other
4 side, this morning, both of them, about whether there is a -- a
5 fact issue baked into this question. And both Mr. -- Mr. Bove
6 and Mr. Blanche said that the facts are uncontested.

7 So what we heard that to mean, what we, the government,
8 heard that to mean, is that President Trump took the documents,
9 he knowingly took the documents, and that he never, in fact,
10 designated them as personal, which is to say, he never uttered
11 the words, he never wrote on anything of them that these are
12 personal. He never told anyone before he left the White House
13 that these things were personal records. And that -- that --
14 if those are the facts that are uncontested, then we might well
15 agree with that.

16 THE COURT: Well, I don't -- I don't know if that's
17 fair. I don't believe there was an admission of guilt,
18 certainly, if that's what you're suggesting. I think it was
19 more that the inference to be drawn from causing the documents
20 to go to Mar-a-Lago is that there was baked into that, as the
21 Counselor in the Judicial Watch said -- case stated, presumably
22 a designation of something as personal.

23 MR. HARBACH: Okay. And I understand Your Honor's
24 point. I think that's -- that may be a fair characterization
25 of their argument, and I'm going to address that very soon.

1 And -- and the fact that that is their contention
2 should tell you something. They -- they put -- they don't even
3 allege -- they don't even allege in their papers that the
4 documents are, in fact, personal. They don't put any evidence
5 forward that they are, because that would be fatal to their
6 Rule 12 claim at this stage.

7 So instead, they rely on this presumption that you have
8 just articulated. That presumption is premised on a single
9 line from a transcript in a totally unrelated case, and I want
10 to talk more about that. But I'm just flagging that that is an
11 issue that should not -- that the Court should not treat that
12 as anything remotely presidential, much less a binding
13 admission by the Department of Justice.

14 And as Your Honor has already observed and plainly
15 understands, our view is that President Trump's interpretation
16 would entirely gut the PRA. So I don't need to explain that
17 because I think you understand it.

18 Suffice it to say that --

19 THE COURT: Do you think that is what the Judicial
20 Watch opinion essentially authorizes, though, that because
21 there is no way to evaluate or second-guess the archivist's
22 decision to designate something as personal or presidential --

23 MR. HARBACH: You mean the -- the president's decision?

24 THE COURT: Yes. Excuse me. That essentially, that
25 that does -- that that is the natural consequence and logic of

1 the Judicial Watch decision, which is, essentially, to set up
2 an honor system that -- that we -- we expect will be followed
3 in good faith, but which lacks any real enforcement mechanism.

4 MR. HARBACH: I would like to talk about Judicial
5 Watch. And I'm happy to pivot that right now and come back to
6 the other two points in a little bit.

7 THE COURT: Okay.

8 MR. HARBACH: The -- I will be honest, the -- the cases
9 that both sides cite in duelling fashion in our briefs:
10 Armstrong I; Armstrong II; Judicial Watch; Peterson, which
11 Your Honor raised; CREW vs. Cheney, you know, they -- and I
12 think one of the courts even observes this, that, you know,
13 there is language in those opinions that's -- that is favorable
14 to both sides.

15 What was helpful to me in understanding them was
16 actually reading them in sequence, in chronological sequence,
17 and a few things stood out to me when I did that. First,
18 Armstrong I, which is the originating case, was a case about
19 disposal of presidential records. It had to do with President
20 Bush 41, and others' materials being erased from a computer
21 system, and some parties -- during the last two weeks of the
22 Reagan administration -- and some parties sued to try and stop
23 that.

24 And in Armstrong I the Court said that allowing
25 judicial -- this is at 924 F.2d at 291 -- that allowing

1 judicial review of the president's general compliance with the
2 PRA at the behest of private litigants would substantially
3 upset Congress's carefully crafted balance of presidential
4 control of records' creation, management, and disposal during
5 the president's term of office, and so on.

6 So we think that that trio of terms --

7 THE COURT: What does "management" mean?

8 MR. HARBACH: Well, I will tell you what Armstrong II
9 says it doesn't mean, and that is the initial classification
10 decision in the first place.

11 Some of the other cases -- I think there is a pair of
12 CREW vs. Trump cases. One is a circuit court decision; one is
13 a district court decision. These are the ones that are most
14 recent. One of them, if memory serves, concerned an outfit
15 being worried that staffers in the Trump administration were
16 using text messaging platforms that themselves, like,
17 automatically deleted text messages or something. So that
18 might be an example of management that the Court says, look,
19 you know, that's not for courts to horn in on, the day-to-day
20 operations of the White House. That might be an example.

21 But the reason that that trio of names is -- the trio
22 of things is important is because what comes next in
23 Armstrong II. This, as Your Honor has already observed,
24 concerned the reviewability of guidelines for what counts as a
25 presidential record in the first place.

1 And the quotation there that I direct Your Honor to,
2 this is at 1 F.3d at 1294, says: The Armstrong I Court was not
3 addressing the initial classification of existing materials.
4 The Armstrong I Court discusses only the creation, management,
5 and disposal -- disposal decisions, described in the provisions
6 of the PRA. None of these decisions encompasses the initial
7 classification of materials as presidential records.

8 Again, that was in the context of guidelines about what
9 counts as presidential.

10 THE COURT: So does that mean that courts can, say,
11 take a record and say, this is presidential or this is
12 personal? Is that what it means to, quote, "review a
13 guideline"; in other words, apply the guideline?

14 MR. HARBACH: In -- in -- maybe. But for present
15 purposes, our argument is that it -- maybe not in binding
16 fashion -- but suggests very strongly that if the -- that if a
17 court can review the guidelines set down by the executive to
18 govern his White House about what counts as presidential and
19 what counts as personal -- that if that power exists in the
20 judiciary, that it suggests strongly, if it doesn't bindingly
21 hold, that review of presidential decisions about specific
22 documents is authorized.

23 But -- but I want to add something to that, and it
24 concerns the district court decisions that follow. So
25 after -- after those two, the two Armstrongs, then we've got a

1 series of district court decisions, of which Peterson is one,
2 Judicial Watch is one.

3 THE COURT: Wait. So I just want to understand.

4 MR. HARBACH: Yeah.

5 THE COURT: So you're saying courts could take a
6 document that was deemed personal by a former president, and
7 then challenge that and say: I'm looking at the guidelines. I
8 have reviewed the guidelines. And I disagree; I think this is
9 squarely a presidential record?

10 MR. HARBACH: I think it might depend on the procedural
11 context in which the question is put to the Court. But, for
12 example -- I think this gets to your question -- even the
13 defense has acknowledged that the PRA's -- that the PRA has a
14 self-contained apparatus, whereby the archivist can deploy the
15 Attorney General to attempt to recover presidential records in
16 replevin actions, okay? So --

17 THE COURT: Never, though, so far, at least from a
18 former president?

19 MR. HARBACH: Well, is -- is your question whether that
20 has been -- whether it's been deployed in that fashion?

21 THE COURT: The answer is no, but you're saying it is
22 possible.

23 MR. HARBACH: My -- my precise point is that the
24 existence of that apparatus necessarily contemplates judicial
25 review of what is presidential versus personal. It can't be

1 that the PRA says, you, NARA, can -- can ask the AG to
2 institute a civil action to recover presidential records. And
3 in the same -- in the same instance be true that a court is
4 powerless to opine on what is a presidential record in the
5 first place.

6 THE COURT: But wouldn't it be the powerless component
7 comes into play when the person whose documents are being
8 seized says, no, I declared them personal, and I don't have to
9 tell you anything more?

10 MR. HARBACH: Well, it -- it -- it's even -- but it's
11 even more than that with -- with the defendant, because the
12 defendant here has said, just by virtue of my taking them, they
13 must be deemed personal.

14 If that were true, then it would be impossible for NARA
15 ever to recover any records, presidential or personal, from a
16 former president, because a fortiori, he's got them, which
17 means he took them. And if that means that that -- that
18 can't -- all we're saying is that it can't mean that there is
19 no judicial review of that decision in the right circumstance.
20 And none of -- none of any of the district court opinions
21 afterwards, certainly not Judicial Watch, holds otherwise.

22 Now, we grant you completely, that the Judge in
23 Judicial Watch was skeptical, but as you know, she didn't rule
24 on that basis.

25 THE COURT: But I take she didn't rule on the judicial

1 review portion. But then, when she gets to redressability,
2 it's almost like there is -- the same exact logic applies to
3 the redressability holding.

4 MR. HARBACH: To a degree. I think I understand what
5 you're saying. But that's where you have to remember that what
6 we're in court here for today is not NARA versus Trump in some
7 civil action; it isn't. And the -- whatever power NARA has or
8 the archivist has or -- or more to the point, in a case like
9 Judicial Watch, whatever power a private citizen has to try and
10 force NARA to deploy its limited authorities says nothing about
11 what the Department of Justice can do in a criminal case,
12 surely not under circumstances like this one.

13 THE COURT: Do you see any constitutional concerns with
14 the Court delving into the -- nope, former president says it's
15 personal, but judicial review is going to conclude otherwise?

16 MR. HARBACH: And understandably, as I said at the
17 outset, there is language underpinning some of these opinions
18 we're talking about, making that very point. But as I said
19 earlier, one of those opinions, though, is the pair of
20 Armstrong opinions. In other words, part of the reason that
21 the Court in Armstrong II said we're not going to get into
22 judges regulating the creation, disposal, or management of
23 these documents, is just because of the separation of powers
24 concerns that you're talking about.

25 But when you're talking about a case like this one,

1 where the -- the constitutional interests aren't, you know,
2 a -- a private litigant seeking to write a book, but you've got
3 the PRA on the one hand, which is executed by Congress, and on
4 the other hand, the Executive Branch itself -- itself, in this
5 incarnation in the -- in the Department of Justice, seeking to
6 carry out its own important executive function, namely,
7 collecting, preserving, and protecting the nation's most
8 closely guarded secrets. So that's the first thing.

9 The second thing is that -- and this is a point we --
10 we make in our papers -- that the logic -- the logic of
11 Armstrong II, Peterson, and CREW vs. Cheney -- this is a --
12 this is our interpretation. But the logic of that is that
13 whatever deference Congress gave to the executive in the PRA --
14 and there plainly is some, of course -- whatever deference
15 Congress gave to the executive via the PRA should not be read
16 to be carte blanche for the president to improperly designate
17 records and thereby thwart Congress's purpose, in enacting the
18 PRA in the first place.

19 And a couple of the opinions -- I think CREW vs. Cheney
20 at one part of the opinion postulates a hypothetical where
21 we -- the vice president were to put forward a guideline that
22 would have effectively rendered all of his legislative records
23 personal; I think that's what it was. And the Court says
24 we -- that -- whatever deference we owe the executive, it can't
25 be used for that.

1 And I think this is the Court that uses the phrase it
2 would be -- it would be -- border on the absurd to effectively
3 gut the PRA. And we think the same is true here, that it would
4 be absurd to do that.

5 THE COURT: Do you view the position in the motion to
6 rest on this implied repeal notion, that you can't have -- that
7 the existence of the civil mechanism in the PRA displaces the
8 executive's ability to bring criminal charges?

9 MR. HARBACH: Unsurprisingly, absolutely not. We think
10 there is no -- there is no displacement there.

11 Give me one second.

12 The -- as I said a moment ago, the idea that -- that
13 NARA's power to recover documents is limited to civil
14 enforcement, doesn't at all even suggest, much less imply, that
15 the agency or anybody at the agency is powerless to call up DOJ
16 and say, I think a crime is being committed. Of course not.

17 And -- and another key point to remember here is NARA
18 didn't refer the matter to the Department of Justice to recover
19 records. NARA referred the matter to the Department of Justice
20 for criminal investigation when it found a boatload of
21 classified documents in what President Trump sent back to them.
22 That was the trigger for the referral.

23 It wasn't that they were saying, hey, Mr. Attorney
24 General, we really need your help getting these boxes back.
25 Can you -- can you, you know, file a -- can you just go file a

1 criminal action? Uh-uh. It was, hey, we found a bunch of
2 classified documents in here, and we need to let you guys know.

3 And one of the things -- on this point, one of the
4 things we point out is in our -- our reply to the amicus that
5 we filed last night is this regulation that suggests not only
6 that NARA is authorized to make a referral in circumstances
7 like that, but they're -- but that they're obliged to.

8 This is -- the citation, Your Honor, is at 32 CFR
9 Section 2001.48. And as I say, this is in what -- I think we
10 mentioned it in what we filed at, whatever, 5:30 or 6:00 last
11 night. Sorry about that.

12 Do you have it or would you like me --

13 THE COURT: I don't have it but -- but I do remember
14 reading that. So...

15 MR. HARBACH: Okay. So I will read a small portion of
16 it into the record. Suffice it to say, it's clear that this is
17 from the body of regulations that govern -- that governs NARA.

18 And it says: Any person who has knowledge that
19 classified information has been or may have been lost, possibly
20 compromised or disclosed to an unauthorized person shall
21 immediately report the circumstances to an official designated
22 for this purpose.

23 That's Section A.

24 And the other part that matters is in Section E, where
25 it says in part: Whenever a criminal violation appears to have

1 occurred and a criminal prosecution is contemplated, agency
2 heads shall use established procedures to ensure coordination
3 with, among other things, the Department of Justice.

4 Why do I mention all of that? Just -- just to say
5 that, of course, NARA could refer this to the DOJ for criminal
6 prosecution. And -- and there is even a decent argument that
7 the regulation obliges them to.

8 THE COURT: So then, I know there is a footnote in your
9 opposition that explains that -- that a defense rooted in -- in
10 the mens rea component could be appropriate, and I was curious
11 if you could shed light on that. I could see this issue very
12 much rearing its head in the form of jury instructions where
13 the defense argument is defining the term "unauthorized"
14 necessarily will require resort to our view on the PRA.

15 And so perhaps you might be right that -- that this is
16 not worthy of dismissal. But wouldn't it, at the very least,
17 be permissible in the form of a trial defense?

18 MR. HARBACH: Maybe. I don't disagree for one second
19 that we will have a lengthy discussion at a charge conference,
20 or maybe at the -- arguing the motions in limine before we get
21 there. The point we were making in the footnote, and the
22 reason I said maybe -- I'm not trying to be glib -- is that we
23 think, at best, it is conceivable -- I'm being sincere -- it is
24 conceivable that if Mr. Trump's defense is I, in fact,
25 thought --

1 THE COURT: But what if it's not even in the form of
2 willfulness? It's just as a matter of law, these things
3 are personal according to our designation and, therefore, not
4 unauthorized, then what is your position on that?

5 MR. HARBACH: Okay. That implicates the second part of
6 the argument, or the second of the three points I was
7 mentioning earlier, which is even if they are personal, does
8 that have anything to do with whether they are authorized under
9 793? And we say no.

10 THE COURT: Hold on. I think you're talking a little
11 fast.

12 MR. HARBACH: Okay.

13 THE COURT: Okay. Please continue.

14 MR. HARBACH: Sorry. I will repeat that last sentence.
15 That goes to the second point that I put a pin in earlier,
16 which is whether -- even assuming that they're personal,
17 whether that has any impact or import at all into whether the
18 possession of those documents was authorized under 793. And
19 that -- I mean, I'm happy to talk about that, if you would
20 like.

21 THE COURT: Yes.

22 MR. HARBACH: Okay. There are several reasons why we
23 think that equivalency can't be true.

24 THE COURT: Everything is fine.

25 MR. HARBACH: Okay. The first is that, as we have

1 said, and as my colleague said earlier today, the authorization
2 to possess classified information that matters for 793 is the
3 one that comes from the Executive Order, not the PRA. So a
4 fair -- well, how do you know that? How do you know that,
5 Mr. Harbach? Well, here is the answer.

6 The Presidential Records Act says zero, zip about
7 classified information, who is permitted to access it, retain
8 it, and so forth. Both sides agree on that. The question is:
9 What is the inference to be drawn from Congressional silence on
10 the subject?

11 I'm not totally clear what the -- what the other side
12 says it means, but I will tell you what we say it means. We
13 say it means that the Court should not infer from silence on
14 Congress's part an intention to disturb the framework governing
15 the handling of classified information that was in place at the
16 time the PRA was passed.

17 In other words, you should not infer any intention on
18 Congress's part by passing the PRA to imbue all personal
19 records of a former president with a permanent exemption for
20 all time from the classification rules.

21 And another point I want to make here. There was a lot
22 of discussion between Your Honor and Mr. Blanche about -- about
23 tension and overriding and trumping, lowercase T, you know,
24 which -- which wins, the Executive Order or the -- or the PRA
25 or the Espionage Act or the PRA?

1 We think that that -- that is not -- that's not a
2 question that needs to be asked here. We don't think there is
3 any tension between the two. And the question, which is in
4 line with a canon Your Honor actually mentioned earlier, the
5 canon of constitutional avoidance says that when a court can,
6 it should harmonize the provisions, it should read them, to the
7 extent possible, to exist side by side.

8 So why do I say they can be read in harmony? Here is
9 why. There is -- there is no need to read the PRA, to intrude
10 on the Executive Branch's function or interests in protecting
11 classified information, there is no read [sic] to read that as
12 implicit in their decision to exclude personal records from the
13 coverage of the PRA.

14 In other words, just because something is personal
15 under the PRA -- it definitely means that it's excluded from
16 the PRA's coverage; that's what the statute says; agreed. But
17 that doesn't guarantee that there -- there can be no other
18 legal constraint.

19 THE COURT: So, like, in the Reagan case, you had
20 personal records that had classified information, no 793(e)
21 charge.

22 MR. HARBACH: Well, yes, but there is an important
23 point buried in there, which Your Honor sort of alluded to
24 earlier, and this is where the notion of segregability matters,
25 it's where it comes in. Because the fact that the definition

1 of personal record or even -- or presidential record includes
2 the idea that it's not just the whole document or none of it,
3 that there could be a segregable part of it. In other words, a
4 segregable part of an otherwise personal record that might be
5 presidential.

6 For that language to mean anything, it has to mean that
7 much. It has to contemplate that in the case of a diary, for
8 example, like President Reagan's diaries, you know, that there
9 were little pieces and parts of that that might be presidential
10 records, or in his case, presidential records that -- that were
11 classified.

12 Now, on the question of, well, why wasn't he
13 prosecuted? That's something else I would like to talk about,
14 the import of all of these other cases, whether it's Clinton or
15 Reagan or Biden.

16 THE COURT: Do you have a view on whether The Clinton
17 Tapes had classified information based on the descriptions one
18 can draw from the -- from the case itself?

19 MR. HARBACH: The view is we do not know. And I don't
20 know if anybody knows. But it certainly cannot be said, as
21 they said in their reply brief, that it's clear and that -- and
22 that -- I think maybe it even said the department doesn't
23 contest that -- that The Clinton Tapes had classified
24 information on them. We don't know. We don't know.

25 THE COURT: But looking at the descriptions of

1 the -- of the -- of the tapes, and the fact that, as far as the
2 record indicates, they were contemporaneous descriptions of
3 ongoing world affairs, including military exercises,
4 and I'm -- I'm just summarizing -- that why -- why wouldn't
5 that quite clearly verge into the very sensitive territory?

6 MR. HARBACH: I suppose it -- it might, but that is
7 one -- only one piece of the puzzle in an assessment of whether
8 to launch a criminal investigation.

9 And -- but the point I would like to make, hopefully
10 quickly, about those other cases, is there is -- there has been
11 a lot of -- a lot of mention of these other cases, under all
12 sorts of rubrics, and I'm going to suggest maybe a helpful way
13 to think about it, hopefully.

14 As we see it, there are three places that this idea
15 could hit the ground in the doctrine. One is in the vagueness
16 and notice context, which is what -- which is why we were
17 talking about it this morning. We've already talked about
18 that.

19 The second is in the notion of judicial estoppel. They
20 have mentioned that. There are lots of reasons why that
21 doctrine has utterly no application here. And I am happy to go
22 into that in just a moment.

23 And then the third potential place that it hits the
24 ground is in the -- and Mr. Blanche alluded to this, too,
25 quite -- quite correctly and fairly -- in the selective and

1 vindictive prosecution domain, potential -- some potential
2 relevance to that discussion. But that, again, is not the
3 motion that is on the table today.

4 So I would like to briefly address the estoppel point,
5 if you would like me to.

6 THE COURT: Yes.

7 MR. HARBACH: Okay.

8 The -- in their reply brief, the defendants kind of
9 took us to task a little bit for not addressing estoppel in our
10 response. In their opening brief, they -- they alluded to it,
11 judicial estoppel -- and you know that, but just so the record
12 is clear. They alluded to it in one sentence followed by a
13 single case without any exposition in their opening brief. And
14 I'm going to address it here, and I am going to address it
15 to -- with resort to no case other than the one they cited, the
16 Slater opinion.

17 And I think it will illustrate the reason that we
18 didn't see fit to spend any of our precious space on it in our
19 response. Because all you have to do is read the opinion to
20 see that it plainly --

21 THE COURT: Can you just explain why it doesn't apply,
22 judicial estoppel?

23 MR. HARBACH: Sure, sure.

24 The Slater case makes clear -- is Your Honor familiar
25 with the facts?

1 THE COURT: Yes.

2 MR. HARBACH: Okay.

3 THE COURT: I would just like to hear the substance.

4 MR. HARBACH: Sure.

5 THE COURT: Okay.

6 MR. HARBACH: There are two -- there is a two-part test
7 for judicial estoppel that was announced in that case. This is
8 an 11th Circuit en banc decision. And what I'm about to say is
9 at page 1181 of the opinion, so it's 871 F.3d 1181.

10 And it says: Our circuit employs a two-part test to
11 guide district courts in applying judicial estoppel. Whether,
12 one, the party took an inconsistent position under oath in a
13 separate proceeding; and two, these inconsistent positions were
14 calculated to make a mockery of the judicial system.

15 So when I read that, I confess that I hadn't seen that
16 standard before. And it's interesting to read the opinion,
17 because among the things that Slater makes clear is that the
18 mental state in part 2 is crucial. In fact, part of what
19 they were -- what they were doing in the en banc opinion in
20 Slater, is they were reversing prior decisions that had equated
21 the simple failure to disclose an asset on a bankruptcy
22 schedule. They had reversed opinions where courts had said the
23 failure -- the failure to disclose a loan is enough to impute
24 the mental state. And the Court here said, no, no, you need
25 more than that.

1 And they elaborated on it a little bit and said that:
2 The Court must take account of all facts and circumstances
3 to -- quoting now -- ensure that judicial estoppel is applied
4 only when a party acted with a sufficiently culpable mental
5 state, and the inquiry includes assessing, quote, whether the
6 party purposely intended to mislead the Court.

7 So what a -- a DOJ attorney said in an offhand remark
8 at oral argument in an entirely different civil case is nothing
9 like what they're talking about in Slater. And so I'm not
10 going to elaborate on it too much. Suffice it to say that
11 reading the factors alone makes it quite clear that that's not
12 what was going on here.

13 And, by the way, they -- they mentioned the fact that
14 the Biden Administration, in connection with the Hur
15 investigation, took the -- a similar position to the one
16 they've taken here. And they suggest that we should somehow be
17 estopped from taking the position we've taken here, because the
18 Biden Administration took that same position on behalf of
19 President Biden in that other investigation.

20 Well, that is just Exhibit 110 for why we are not
21 puppets or appendages of the Biden Administration. We're not.
22 We're a Special Counsel's office of the Department of Justice.
23 We have our view. We have explained our view.

24 It happens that the Hur Special Counsel had the exact
25 same view about the interplay of -- of "personal" and

1 "unauthorized."

2 But the last thing I want to mention is that here
3 is -- here is another example that really proves the point. In
4 his very first appearance before Your Honor, one of the lawyers
5 for President Trump, Mr. Kise -- he is here today -- said to
6 Your Honor -- quoting from the transcript now -- this was in
7 the special master litigation -- said: What we are talking
8 about here in the main are presidential records in the hands of
9 the 45th President of the United States, at a location that was
10 used frequently during his term as president to conduct
11 official business. This is not a case about some Department of
12 Defense staffer stuffing military secrets into a paper bag and
13 sneaking out in the middle of the night. This is, as I say,
14 presidential records in the hands of the 45th President of the
15 United States.

16 Now, am I mentioning that to suggest to Your Honor that
17 they should be estopped from claiming that their records are
18 personal? Of course not. We're not saying that. But I think
19 it does reveal a little bit of the silliness of their argument.

20 THE COURT: Well, I don't know. I can't recall here,
21 sitting here, exactly whether there was a final position there,
22 taken on presidential versus personal, or whether it was still
23 to be determined, given the uncertainty of the designations at
24 that point.

25 But in any case, I think your judicial estoppel point

1 is -- is received, and I think the Slater decision is relevant.

2 So thank you for that.

3 MR. HARBACH: Okay.

4 THE COURT: Any other points you wish to make on the
5 Presidential Records Act?

6 MR. HARBACH: Can I just have a moment, please?

7 I don't think so, Your Honor, unless you have any other
8 questions.

9 THE COURT: No, I am all set for now. Thank you.

10 All right. I will hear final argument on this motion,
11 which is 327. Then I would like to wrap up, hopefully, before
12 3:00. And if there are any pressing other items that need to
13 be raised before we recess, you may do so as well.

14 MR. BLANCHE: Very briefly, Your Honor. With respect
15 to the way that just ended, quoting Mr. Kise from the special
16 master's proceeding, if the Court reviews that transcript,
17 Mr. Kise was taking the government's position at face value and
18 assuming it to be true for purposes of the argument that
19 was -- he was making now. It certainly wasn't President Trump
20 or Mr. Kise even committing to what we're talking about now,
21 that the records were, in fact, personal.

22 The one important part that I -- needs addressing has
23 to do with the -- again, with the interplay between the PRA and
24 the Espionage Act. And it's -- it's not -- it cannot be, as
25 the Special Counsel just suggested, using the Reagan example,

1 that you can have a personal record with classified information
2 on it, and that under the PRA, the way that you deal with that
3 is you -- you possibly divide it up. Maybe you redact
4 something or something like this.

5 If that's -- if that's the case, play that out. How
6 does that happen in the context of a grand jury investigation?
7 We're not talking -- we're not talking about anything like what
8 happened here, right? There was no effort here to -- to use
9 the PRA and to use the structure of the PRA as it's been used
10 every other time with every other president to try to collect
11 information that -- that NARA believed that they were entitled
12 to. This was completely separate, unique, has never been done
13 before, and hopefully will never be done again, the way that
14 this happened.

15 And now the Special Counsel, again, like they did in
16 their papers, just justifies every step they -- that they have
17 taken without honestly representing to the Court that NARA has
18 taken exactly the opposite position repeatedly since the
19 passing of the PRA and --

20 THE COURT: Okay. But their position, and it's -- it's
21 correct that NARA is not the one sitting on that table bringing
22 this case, and that -- so, really, that's a red herring.

23 MR. BLANCHE: Your Honor, respectfully, I don't think
24 it's a red herring, because the reason why we're making this
25 argument is about -- is about a single word in -- in the

1 indictment, which is "unauthorized." And as a matter of law,
2 we very much believe that under NARA -- and I do think it's
3 appropriate to look at the case law and to the NARA regs and to
4 the PRA -- President Trump, as president, had the authority to
5 designate records as personal. Now --

6 THE COURT: Can you tell me what your definition of
7 "unauthorized" would be, jumping forward to jury instruction
8 charge conference and weaving in these PRA concepts?

9 MR. BLANCHE: Your Honor asked a very good question of
10 the Special Counsel. Our definition would be consistent with
11 what we're saying now, which is that the Presidential Records
12 Act gives a president or vice president complete autonomy to
13 manage records while president in a way that he or she sees
14 fit, and that there is no Special Counsel and NARA -- no -- no
15 way the judiciary, the legislature -- the legislative session
16 should not in any way touch the president's decision in order
17 to do that. And in this case, by not sending the records to
18 NARA, President Trump was necessarily classifying them as
19 personal. And --

20 THE COURT: That -- that last thing you said, that's
21 not actually memorialized in the Judicial Watch decision,
22 correct, that the -- the failure to send documents to NARA
23 equals personal designation?

24 MR. BLANCHE: The -- the -- it's referenced but not
25 memorialized. And the PRA doesn't describe anything else. The

1 PRA simply says that at the conclusion of an administration,
2 presidential records shall be sent to NARA. It doesn't say,
3 oh, and, by the way, personal records have to be reviewed by a
4 NARA representative, or personal records have to be --
5 you know, you cannot have classified information in personal
6 records. The PRA doesn't speak to that.

7 And that's intentional. I mean, if you look at the --
8 at the reasons for -- for enacting it, they wanted to
9 try -- Congress wanted to try to fine-line between giving a
10 president the authority to -- to do -- to do what he needs to
11 do while president, but also try to maintain presidential
12 records. So that's why the statute doesn't speak to anything
13 else. The statute doesn't say we'll decide about personal
14 records later. It says -- no -- it says, if it's presidential,
15 send it -- send it to NARA.

16 And I do think on -- on how the PRA and the Espionage
17 Act ultimately have an interface, we -- we don't know -- we
18 never got that far in this case, but certainly, there
19 is -- there is the potential that there could be discussion,
20 potentially, between NARA and a former president or vice
21 president about records that are deemed personal. But, again,
22 under the PRA, that's President Trump or President Biden now,
23 or President Reagan, President Clinton, it's their decision.
24 And NARA has the ability to engage. And there is case law that
25 talks about discussions that take place. But that's -- but

1 that's it.

2 And there isn't tension. If you read the statutes that
3 way, the Espionage Act and the PRA, there is no tension there.
4 I mean, it's not as if -- and, again, if "personal" under the
5 PRA, then under the definition of what a record is under the
6 applicable Executive Order, Section 61(hh), it -- if it's
7 personal, it's not a record. So the fact that --

8 THE COURT: So your argument hinges on the "it is
9 personal" designation, which is not in the indictment. I know
10 you draw the inference from paragraph 4. But it can't
11 reasonably be stated that the indictment endorses the view that
12 the documents are personal.

13 You would have to agree with that, correct?

14 MR. BLANCHE: It doesn't endorse the fact, of course
15 not. But, Judge, there is no way to endorse it. That's
16 the -- the PRA doesn't say, here is what a president has to do
17 to endorse it. Here is a check that has to be -- a checkmark
18 that has to be checked on a particular filing. No. It just
19 says, if it's presidential, send it over here.

20 And so how -- how is one to prove, a former president
21 to prove that the records are personal, but for the fact they
22 were not sent to NARA? There is no -- no court has held
23 otherwise.

24 THE COURT: Is there anything to make of the fact that
25 some items are returned in January, and so -- and there was

1 no -- no procedure to quash that subpoena? What do you make of
2 that? There is some discussion in the filings.

3 MR. BLANCHE: No, absolutely, it's a good question, and
4 I think there is a lot to be made of it. In the -- when the
5 PRA was developed, this was the hope of Congress, that by
6 giving a president the autonomy to designate records as he see
7 fit -- sees fit, when a president leaves office, they may
8 choose to return -- return certain materials that had
9 previously been marked "personal" and give them to the National
10 Archives.

11 I mean, you talk about -- you know, this is again from
12 a brief. It's -- it's written by the Department of Justice.

13 By giving each president complete control over his
14 personal papers, Congress hoped that it would encourage
15 presidents to create and preserve such papers and that
16 presidents would later voluntarily donate those papers to the
17 National Archives.

18 THE COURT: Where are you reading from?

19 MR. BLANCHE: I'm reading from -- well, footnote 1 in
20 our -- in our brief on page 2, Your Honor.

21 THE COURT: Okay.

22 MR. BLANCHE: But it's -- it's ECF Number 32 -- 327-1,
23 at page 63; so it's from our -- our filing. It's a DOJ brief
24 in -- in Judicial Watch.

25 THE COURT: Okay.

1 MR. BLANCHE: So it's -- it happened the way it's
2 supposed to happen, which is that President
3 Trump -- President -- President Trump made the decision to
4 return and donate items he, in his sole discretion, determined
5 were personal back to the -- back to the National Archives.

6 THE COURT: Okay.

7 MR. BLANCHE: It's also the footnote 1 on our -- in our
8 reply brief, Document Number 399, Your Honor.

9 THE COURT: Okay. Anything else on Presidential
10 Records Act?

11 MR. BLANCHE: No, Your Honor.

12 THE COURT: Okay. All right. Anything very pressing
13 that would need to be addressed now?

14 MR. BLANCHE: No.

15 THE COURT: Okay.

16 MR. BLANCHE: Not from our side.

17 THE COURT: Okay. Thank you then.

18 Let me ask the same question of the Special Counsel.
19 Mr. Bratt or Mr. Harbach?

20 MR. BRATT: No, Your Honor.

21 THE COURT: Okay. Well, then, thank you all for your
22 time and attention. I know we have talked a lot about the law,
23 and it's all very worthwhile, and I appreciate the assistance.

24 The Court is now in recess. I take the motions under
25 advisement and will be ruling on them promptly. Thank you.

1 (These proceedings concluded at 2:42 p.m.)

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C E R T I F I C A T E

I hereby certify that the foregoing is an accurate transcription of the proceedings in the above-entitled matter.

DATE: 03-14-2024 /s/Laura Melton
LAURA E. MELTON, RMR, CRR, FPR
Official Court Reporter
United States District Court
Southern District of Florida
Fort Pierce, Florida

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